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In the Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MACHINISTS LOCAL 1327, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 115, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a union rule that restricts members from resigning from the union during a strike and returning to work impermissibly abridges the right of employees to refrain from engaging in union activities.

PARTIES TO THE PROCEEDINGS

The proceedings in the court of appeals consolidated separate Board orders concerning the respondent identified in the caption and District Lodge 160, International Association of Machinists and Aerospace Workers, AFL-CIO, and its affiliated Local Lodge 1028, which are accordingly also respondents in this Court. Viola Lapinski, Hilda Hall and Polmyra Gomes, charging parties before the Board in *Machinists Local 1327*, and Robert Ferguson, charging party in *District Lodge 160*, intervened in the case in the court of appeals and, pursuant to Rule 19.6 of the Rules of this Court, are respondents in this Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 725 F.2d 1212. A related earlier opinion (App., *infra*, 35a-43a) is reported at 608 F.2d 1219. The decisions and orders of the National Labor Relations Board (App., *infra*, 13a-34a, 44a-79a, 80a-88a) are reported at 231 N.L.R.B. 719, 263 N.L.R.B. 984 and 265 N.L.R.B. 1049.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 89a-90a) was entered on February 14, 1984, and a peti-

tion for rehearing was denied on July 10, 1984 (App., *infra*, 91a-92a). This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a)(3) of this title.

Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A), provides:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein[.]

STATEMENT

I. The Board's Decisions[1]

A. Machinists Local 1327 (Dalmo Victor)

1. Machinists Local 1327 is the collective bargaining representative of the employees of Dalmo Victor, a di-

[1] Two Board cases were consolidated in the court below. In both, the facts had been stipulated by the parties before the Board.

vision of Textron, Inc. On April 19, 1974, Local 1327 called a meeting of its membership, which at that time included Dalmo Victor employees Hilda Hall, Viola Lapinski and Polmyra Gomes, to inform the members of a newly adopted amendment to the Machinists' International constitution that provided as follows (App., *infra*, 15a):

> *Improper Conduct of a Member* * * * Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout [or] within 14 days preceding its commencement. Where observance of a primary picket line is required, resignation shall not relieve a member of his obligation to observe the primary picket line for its duration if the resignation occurs during the period that the picket line is maintained or within 14 days preceding its establishment.

In early June 1974, Local 1327 called a meeting of its membership to take a strike vote against Dalmo Victor and again reminded its members of the constitutional provision. On the same day Local 1327 began an economic strike against Dalmo Victor and established a picket line. App., *infra*, 16a.

On February 14, 1975, Hall and Lapinski submitted written resignations to the Union, and on February 18 they crossed the picket line and returned to work. Gomes submitted her resignation on May 10, 1975, and returned to work on May 12. Local 1327 fined Hall and Lapinski $2,277.50 each and fined Gomes $1,125 for working during the strike. The fines are enforceable in court. App., *infra*, 16a.

2. The Board found that Local 1327 violated Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A), by fining the three employees for returning to work during the

strike. In so holding, the Board construed the constitutional provision as an unlawful attempt to restrict the post-resignation conduct of former members, and not as a restriction on the right of members to resign. App., *infra*, 17a-19a.[2]

3. The court of appeals denied enforcement of the Board's order (App., *infra*, 35a-43a). The court disagreed with the Board's finding that the constitutional provision in issue was an attempt to control post-resignation conduct, and instead found that it was a restriction on a member's right to resign from the Union (*id.* at 37a, 39a). Noting that the validity of such a constitutional provision had been left open by this Court both in *NLRB* v. *Granite State Joint Board, Textile Workers Union*, 409 U.S. 213, 216 (1972), and in *Booster Lodge No. 405, International Association of Machinists* v. *NLRB*, 412 U.S. 84, 85-86, 88 (1973), the court remanded to the Board for reconsideration of that issue (App., *infra*, 39a-40a).

4. On remand, the Board concluded that the constitutional provision restricting resignation during the course of a strike or within 14 days preceding its commencement constituted an unreasonable restriction on union members' Section 7 right to refrain from concerted activities by resigning from the Union.[3] Accord-

[2] Two dissenting Board members construed the provision as a lawful restriction on resignations by members (App., *infra*, 25a-33a).

[3] Board Members Fanning and Zimmerman found that "a union rule which limits the right of a union member to resign only to nonstrike periods constitutes an unreasonable restriction on a member's Section 7 right to resign" (App., *infra*, 53a). In their view, however, the balance of competing interests between the member's Section 7 right to refrain from concerted activities and the union's "legitimate interest * * * in protecting employees it represents who have joined together in collective economic activity" (App., *infra*, 48a) would allow a union to "place some reasonable limitation on the right to resign so

ingly, the Board reaffirmed its initial decision that Local 1327 violated Section 8(b)(1)(A) of the Act by imposing fines pursuant to that provision. App., *infra*, 55a. The Board ordered Local 1327 to cease and desist from imposing court-collectible fines on members who resign during a strike and return to work, to rescind the fines levied against the three employees, and to refund to them any monies they may have paid as a result of the fines (App., *infra*, 23a, 55a).

B. Machinists Local 1028 (Gray Motors)

1. Local 1028 is the collective bargaining representative of the employees of Gray Motors, Inc. At a regular union meeting on May 6, 1980, copies of a flyer containing the same provision in the Machinists' International constitution relied on by Local 1327 (page 3, *supra*) were passed out to the membership. At another union meeting on June 3, 1980, at which members voted to strike, the constitutional provision was again commu-

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long as such rules are applicable during both strike and nonstrike periods" (*id.* at 53a). Members Fanning and Zimmerman stated that in their view "a rule which restricts a union member's right to resign for a period not to exceed 30 days after the tender of such a resignation" would constitute such a reasonable limitation (*id.* at 54a).

Chairman Van de Water and Member Hunter, concurring in the decision, found that any restriction imposed by a union on its members' right to resign is unreasonable, and therefore that any fine or other discipline imposed for violation of such a restriction violates Section 8(b)(1)(A) (App., *infra*, 56a, 72a). Member Jenkins, dissenting, found the constitutional provision to be a lawful restriction on resignations during a strike (*id.* at 73a-79a).

A majority of the Board subsequently adopted the position of the concurrence in *Dalmo Victor* that any restrictions placed by a union on its members' right to resign during a strike are unreasonable. *International Association of Machinists, Local Lodge 1414 (Neufeld Porsche-Audi, Inc.)*, 270 N.L.R.B. No. 209 (June 22, 1984). The Board's decision in that case is set forth at App., *infra*, 93a-126a.

nicated to those present. Union member Robert Ferguson was present at both meetings. App., *infra*, 83a.

On June 11, 1980, Local 1028 began a strike against Gray Motors. Ferguson wrote a letter resigning his union membership, which the Union received on June 13; on that day he returned to work for the balance of the strike. Following a union disciplinary hearing, Ferguson was fined $60 per day for each of the 22 days he worked after his resignation became effective while Local 1028 was on strike against Gray Motors. App., *infra*, 83a.[4]

2. The Board, relying on its decision in *Dalmo Victor*, found that Local 1028's fine against Ferguson violated Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A) (App., *infra*, 84a). The Board ordered Local 1028 to cease and desist from the unlawful conduct, rescind the post-resignation fines, and refund any monies paid (App., *infra*, 86a).

II. The Court of Appeals' Decision

After consolidating the two cases for briefing and oral argument, the court of appeals denied enforcement of the Board's orders. The court held that the union constitutional provision at issue here is protected by the proviso to Section 8(b)(1)(A) allowing a union "to prescribe its own rules with respect to the acquisition or retention of membership" and that therefore its enforcement does not constitute an unfair labor practice. App., *infra*, 1a-12a.

The court reasoned that, although union members have a right protected by Section 7 of the Act to refrain from concerted activities by resigning from the union, that right "coexists" with the union's interest in pre-

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[4] The parties stipulated that the fine levied on Ferguson for working on June 13, before his resignation became effective, was not in issue (App., *infra*, 83a n.5).

senting "a solid front to the employer." Thus, the court held that, notwithstanding their Section 7 right to resign, union members have an obligation to refrain from "post-resignation strikebreaking." App., *infra*, 8a-10a. The court concluded that the union's interest in solidarity during and just prior to a strike therefore justifies the penalty placed on the exercise of members' Section 7 right to resign by the constitutional provision restricting resignation.[5] The court reasoned that a fine is the union's only effective method for insuring adherence to the obligations imposed by the union-member "contract." App., *infra*, 11a.

REASONS FOR GRANTING THE PETITION

1. The decision of the court of appeals that a union does not commit an unfair labor practice by enforcing a constitutional provision restricting resignations during a strike or within 14 days preceding its commencement is, as the court recognized (App., *infra*, 9a-10a n.5), in direct conflict with the decision of the Seventh Circuit in *Pattern Makers League* v. *NLRB*, 724 F.2d 57 (7th Cir. 1983), petition for cert. pending, No. 83-1894.[6] In

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[5] The court explained that restriction as follows (App., *infra*, 10a):

> The union constitution * * * does not force a member to remain a member * * * for the remainder of the strike. Our previous finding that the rule constitutes "a restriction on a member's right to resign" * * * means only that the rule puts some obstacles in the way of resignation. We do not dispute the employee's § 7 right to resign from the union. But we disagree with the view that it is unreasonable for the union to penalize a member for breaching certain crucial obligations—here, the duty to refrain from strikebreaking.

[6] On August 15, 1984, we filed a memorandum in No. 83-1894 indicating that, because of the clear conflict and the importance of the issue, we do not oppose the granting of the petition for certiorari in that case. We are sending a copy of that memorandum to respondents.

Pattern Makers the court upheld the Board's decision that fines imposed under a similar constitutional provision restricting resignations during strikes violated Section 8(b)(1)(A) of the Act.[7] The court, relying on *Scofield* v. *NLRB*, 394 U.S. 423 (1969) (as did the Ninth Circuit in the instant case), found that because such a restriction "completely suspends an employee's right to choose not to be a union member and thus no longer subject to union discipline, it frustrates the overriding policy of labor law that employees be free to choose whether to engage in concerted activities." 724 F.2d at 60. The court rejected the proposition accepted by the Ninth Circuit that, by joining the union and participating in the decision to strike, members forfeited their Section 7 right thereafter to change their minds and abandon the strike by resigning from the union. 724 F.2d at 60-61. Rather the court, citing *NLRB* v. *Granite State Joint Board, Textile Workers*

[7] The constitutional provision in *Pattern Makers* provides that: "'No resignation or withdrawal from [the union] shall be accepted during a strike or lockout, or at a time when a strike or lockout appears imminent.'" 724 F.2d at 58. The Board, relying on its decision on remand in *Dalmo Victor*, found that, "[w]hile [the challenged provision] apparently provides for resignations during nonstrike periods, it clearly prohibits any such resignations once a strike has begun or when one 'appears imminent.' Under the Board's holding in *Dalmo Victor*, [that provision] can be construed as neither valid nor enforceable." 265 N.L.R.B. 1332, 1333 (1982). We do not believe that the difference between the provision in *Pattern Makers* and the one in the instant case is legally significant. The threat of enforcing, by court-enforceable fines, the prohibition against returning to work after resigning from the union during a strike chills the exercise of union members' Section 7 right to resign no less than does a flat prohibition against resignation. See also *Neufeld Porsche-Audi, Inc.*, App., *infra*, 98a, 102a, 103a. The Court may nevertheless wish to consolidate this case with *Pattern Makers* for argument and decision, in order to evaluate fully the effects of both types of provisions.

Union, 409 U.S. 213 (1972), stated that "[t]he Section 7 right to refrain from union activities encompasses the right of members to resign from the union" (724 F.2d at 60). The court added that "[a]n employee's right to resign cannot be overriden by union interests in 'group solidarity and mutual reliance in situations in which a collective effort is necessary to achieve a particular result' upon which the Union so heavily relies" (*ibid.*). Accordingly, the court concluded that the proviso to Section 8(b)(1)(A) does not allow a union to "compel membership during a strike * * * in derogation of an employee's right to choose whether to be a part of such * * * activity" (724 F.2d at 60).

The conflict between the Seventh and Ninth Circuits concerns an important and recurring question under the Act, which this Court has expressly left open on two occasions. In *NLRB* v. *Granite State Joint Board, Textile Workers Union*, *supra*, and *Booster Lodge No. 405, International Association of Machinists* v. *NLRB*, 412 U.S. 84 (1973), the Court held that unions violated Section 8(b)(1)(A) of the Act by imposing discipline pursuant to rules prohibiting strikebreaking by members on employees who had resigned their membership in the union before they returned to work.[8] Recognizing that "the vitality of § 7 requires that the member be free to refrain in November from the actions he endorsed in May and that his § 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity," *Granite State*, 409 U.S. at 217-218, the Court in both cases held that "[w]here a member lawfully resigns from a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for

[8] In *Granite State* the rule against working during the strike was imposed by a membership vote after the strike began (409 U.S. at 214), while in *Booster Lodge* the union's constitution prohibited members from strikebreaking (412 U.S. at 84).

that conduct." *Id.* at 217; *Booster Lodge*, 412 U.S. at 87. But in both *Granite State* and *Booster Lodge* the union constitutions and by-laws contained no restriction on the right of members to resign during a strike, and in both cases the Court expressly reserved "the question of the extent to which contractual restriction on a member's right to resign may be limited by the Act." *Booster Lodge*, 412 U.S. at 88; see *Granite State*, 409 U.S. at 216, 217-218.[9] Now that the Board has decided that important question and the Board's decision has precipitated a direct conflict in the circuits, it is appropriate for the Court to settle the issue.

2. As this Court made clear in *Scofield* v. *NLRB*, *supra*, a union under Section 8(b)(1)(A) is free "to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule." But "if the rule invades or frustrates an overriding policy of the labor laws the rule may not be enforced * * * without violating § 8(b)(1)" (394 U.S. at 429). See, *e.g.*, *NLRB* v. *Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418 (1968) (union rule requiring members to exhaust union remedies before filing unfair labor practice charges with the Board is unenforceable as contrary to the policy of the Act in favor of unfettered access to the Board). Although a union rule that in effect requires members to relinquish their right to resign from the union during a strike serves a legitimate union

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[9] In addition to the unions involved here and in *Pattern Makers*, other unions have amended their constitutions since the Court's decision in *Booster Lodge* to restrict resignations from membership during strikes. See Wellington, *Union Fines and Workers' Rights*, 85 Yale L. J. 1022, 1044 n.118 (1976).

interest, it violates policies that "Congress has imbedded in the labor laws."[10]

Section 7 protects the right of employees freely to choose whether to join a union or to refrain from doing so, and this includes the right to resign from the union after having joined it. The policy of freedom of choice with respect to joining or supporting a union is firmly imbedded in the Act, which recognizes only a limited exception to the right of employees to make their own choices concerning participation in union activities. As the Board explained in *Neufeld Porsche-Audi, Inc.* (App., *infra*, 103a (footnote omitted)): "The only statutory limitation on these Section 7 rights is contained in

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[10] The restriction on resignation during a strike also runs afoul of the teaching of *Scofield* that a union rule is valid only if it is reasonably enforced against members "who are free to leave the union and escape the rule" (394 U.S. at 430). Although purporting to apply *Scofield*, the court below failed to discuss—or even to quote—this portion of the *Scofield* test (see App., *infra*, 7a-8a). We submit that the Court's analysis in *Scofield* demonstrates that the union members' freedom to "opt out" is a critical element in any assessment of the reasonableness of a union rule. *Scofield* approved a union rule enforcing a production ceiling on union members who worked on a piecework basis; this Court explained its rationale as follows (394 U.S. at 435):

> If [union] members are prevented from taking advantage of their contractual rights [under the piece-work system] * * * it is because they have chosen to become and remain union members. * * * If a member chooses not to engage in this concerted activity and is unable to prevail on the other members to change the rule, then he may leave the union and obtain whatever benefits in job advancement and extra pay may result from extra work * * *.

In contrast, in the present case union members who left the Union in order to return to work for their employer were subjected to court-enforceable fines, and accordingly their freedom under the union constitution to resign did not enable them to "escape the rule" and obtain the benefits of nonmembership. See *Neufeld Porsche-Audi, Inc.* (App., *infra*, 103a-104a, 106a-107a).

Section 8(b)(2), 29 U.S.C. 158(b)(2) and the second proviso to Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3). Even under those provisions, however, no employee can be compelled to become a full union member, and an employee thus remains free to choose to refrain from union or other concerted activities."[11]

A union rule that requires employees, as a condition of membership, to relinquish their right to leave the union for the duration of a strike frustrates the Act's fundamental policy of free choice expressed in Section 7, and the corollary "policies of Section 8(b)(2) and the second proviso to Section 8(a)(3) that serve to prohibit a union from compelling full union membership" (*Neufeld Porsche-Audi, Inc.*, App., *infra*, 103a), no less than

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[11] The first proviso to Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), permits unions and employers to enter into union security agreements requiring that employees join the union as a condition of continued employment. In enacting the Taft-Hartley Amendments of 1947, however, Congress made clear that requiring union "membership," even under the union security proviso, does not permit unions to subject employees involuntarily to union discipline, but only requires that they pay dues and normal fees, *i.e.*, that they accept limited "financial core" membership. Thus, in 1947 Congress added a second proviso to Section 8(a)(3) stating that "no employer shall justify any discrimination against an employee for nonmembership in a labor organization * * * for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership * * *." Similarly, Section 8(b)(2) prohibits comparable union discrimination on grounds related to membership obligations other than failure to pay dues or fees. See *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742-743 (1963); *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 40-42 (1954); *Union Starch & Refining Co.*, 87 N.L.R.B. 779, 783-786 (1949), enforced, 186 F.2d 1008, 1012-1013 (7th Cir.), cert. denied, 342 U.S. 815 (1951). In interpreting these Amendments, the Board has long held that resigning from a union after earlier accepting full membership is "an act not qualitatively different from the refusal by employees *to join* a union." *Marlin Rockwell Corp.*, 114 N.L.R.B. 553, 560 (1955) (emphasis in original).

does a union's attempt to impose discipline on an employee who is no longer a member, *Granite State*, or on an employee who never joined.

The court of appeals' position that there can be no conflict "between the employee's right to resign union membership and the union's interest in making rules regarding the acquisition and retention of membership" because both are "embedded" in the statute (App., *infra*, 9a-10a), ignores the teaching of both *Scofield* and *Industrial Union of Marine & Shipbuilding Workers*, *supra*, that the proviso to Section 8(b)(1)(A) allowing unions to make rules "with respect to the acquisition or retention of membership" does not privilege a union rule that is contrary to a basic policy of the Act.[12] And contrary to the view of the court below (App., *infra*, 8a-9a), an employee's Section 7 right to refrain from union activity by resigning from the union cannot be overridden by the union's need for solidarity to make the strike effective, or by the reliance of other strikers on the returning striker's earlier promise to honor the strike. See *Granite State*, 409 U.S. at 217-218. Although an employee who has voluntarily joined a union must accept its reasonable rules and is subject to court-enforceable fines if he violates a union rule against strikebreaking while he remains a union member (*NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967)), the vitality of Section 7 requires that a member be free, even in the face of an express promise to remain a member during the ordeal of a strike, to quit the union entirely and thereby avoid disciplinary fines for

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[12] Thus, although the proviso generally protects rules regarding both acquisition and retention of membership, it permits a union neither to require employees to *acquire* union membership and join a strike against their will (see note 11, *supra*; *United Stanford Employees, Local 680* v. *NLRB*, 601 F.2d 980 (9th Cir. 1979)) nor to require employees involuntarily to *retain* union membership for the duration of a strike.

his post-resignation conduct.[13] As the Court noted in *Granite State*, 409 U.S. at 217:

> Events occurring after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind. The likely duration of the strike may increase the specter of hardship to his family; the ease with which the employer replaces the strikers may make the strike seem less provident.

In sum, the Board reasonably concluded that Section 8(b)(1)(A) prohibits a union from requiring employees involuntarily to retain union membership for the duration of a strike in derogation of their Section 7 right to refrain from concerted activity. The court below, by substituting its contrary judgment for that of the Board, has impermissibly intruded on the Board's "primary responsibility [under the Act] of marking out the scope of the statutory language." *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 496 (1979); see *NLRB* v. *City Disposal Systems, Inc.*, No. 82-960 (Mar. 21, 1984), slip

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[13] The claim that employees contractually waive their Section 7 rights by assuming membership knowing of the restriction on resignation is no more valid here, where the restriction is explicit in the Union's constitution, than it was in *Granite State*, 409 U.S. at 217-218, where the restriction on resignation was said to be implicit in the employees' vote to strike. See also *NLRB* v. *Magnavox Co.*, 415 U.S. 322, 325 (1974) (invalidating a contract clause waiving the right of employees lawfully on their employer's premises to use their nonworking time to support or oppose the incumbent union); *Local 900* v. *NLRB*, 727 F.2d 1184, 1190 (D.C. Cir. 1984) (rejecting union contention that employees waived the protection of Section 7 by ratifying a contract clause affording superseniority to certain union officers and holding that the Section 7 right at stake is not waivable). Moreover, it is significant that the "contract" here is one of "adhesion"—that is, "[t]he member has no choice as to its terms but is compelled to adhere to the inflexible ones presented." Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1055 (1951) (footnote omitted).

op. 6; *NLRB* v. *Iron Workers*, 434 U.S. 335, 350 (1978); *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251, 260, 266-267 (1975).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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September 1984

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 82-7580 & 82-7701

MACHINISTS LOCAL 1327, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 115, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT,

and

VIOLA LAPINSKI, HILDA HALL, AND POLMYRA GOMES, INTERVENORS.

Nos. 83-7052 & 83-7089

DISTRICT LODGE 160, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, AND AFFILIATED LOCAL LODGE 1028, PETITIONERS,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT,

and

ROBERT C. FERGUSON, INTERVENOR.

ON PETITIONS FOR REVIEW
AND CROSS-APPLICATIONS FOR ENFORCEMENT
OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

ARGUED AND SUBMITTED AUGUST 8, 1983
Filed: Feb. 14, 1984

OPINION

Before TUTTLE* and MERRILL, *Senior Circuit Judges*, and PREGERSON, *Circuit Judge*.

PREGERSON, *Circuit Judge:*

The question presented is whether a labor organization reasonably restricts the right to resign union membership when it imposes a fine under its constitution on a member who quits the union during a strike to resume working for the struck employer.[1] Because the restriction at issue comports with both national labor policy and the test set out in *Scofield* v. *NLRB*, 394 U.S. 423 (1969), we refuse to enforce the order of the National Labor Relations Board.

BACKGROUND

This case comes before us a second time. The parties do not dispute the facts, which we first outlined in *NLRB* v. *Machinists Local 1327 (Machinists I)*, 608 F.2d 1219 (9th Cir. 1979). The facts show that shortly before calling an economic strike against the employer,

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* Honorable Elbert P. Tuttle, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

[1] This is the question the Supreme Court reserved in both *Booster Lodge 405* v. *NLRB*, 412 U.S. 84, 88 (1973) (per curiam), and *NLRB* v. *Granite State Joint Board*, 409 U.S. 213, 217 (1972). These cases do not suggest that the Court would invalidate the rule in the present case, for neither *Booster Lodge* nor *Granite State* involved a union rule that expressly penalized a member resigning union membership during a strike to resume working for the struck employer.

the union reminded all members about the following rule in the union's constitution:

> *Improper Conduct of a Member:* . . . Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout within 14 days preceding its commencement . . . .

Eight months after the strike began, three of the intervenor employees, Viola Lapinski, Hilda Hall, and Polmyra Gomes, submitted their resignations to the union, crossed the picket line, and returned to work. Later, the union imposed court-collectible fines on each employee for violating the rule. The employees responded by complaining that the union had violated National Labor Relations Act (NLRA) § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1976),[2] and the Board issued a complaint. In a case tried on stipulated facts, the Board construed the provision as merely prohibiting certain post-resignation conduct, not as restricting the union member's right to resign. 231 N.L.R.B. 719, 720-21 (1977).

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[2] Section 8(b)(1)(A) provides in relevant part:

> It shall be an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in [§ 7] of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .

29 U.S.C. § 158(b)(1)(A) (1976). Section 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and shall also have the right to refrain from any or all of such activities . . . .

Id. § 157.

Considering that decision on the first appeal, we criticized the Board's construction of the provision as "hypertechnical." *Machinists I*, 608 F.2d at 1222. We concluded that the rule "defines or limits the circumstances under which a member may resign, and is a restriction on a member's right to resign," and asked the Board on remand to determine whether such a restriction was valid. *Id.*

On remand, a plurality of the Board decided that it should balance two competing interests: the employee's right to refrain from collective activity under NLRA § 7, 29 U.S.C. § 157 (1976), and the legitimate interest of a union in representing every employee in its bargaining unit. 263 N.L.R.B. 984, 985 (1982) (Fanning & Zimmerman, Members). After performing this operation, the plurality held that a union rule limiting a member's right to resign only to non-strike periods "constitutes an unreasonable restriction" on the right to resign. *Id.* at 986. The plurality went on to articulate a new rule permitting a union to prohibit a resignation "for a period not to exceed thirty days after the tender of such a resignation." *Id.* at 987.

But the two Board members who concurred in the result thought that *any* restriction on the employee's right to resign from the union is an unfair labor practice. *Id.* at 987-88 (Van de Water, Chairman & Hunter, Member, concurring). They filed a lengthy opinion disagreeing with the plurality's 30-day rule and virtually all of its reasoning.

A fifth Board member dissented altogether. He would have held that the rule was a reasonable restriction on the right to resign. *Id.* at 993 (Jenkins, Member, dissenting).

The union now petitions for review and the Board cross-applies for enforcement of its order.

STANDARD OF REVIEW

Ordinarily, we give "considerable deference" to the Board's expertise in construing and applying the labor laws. *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 104 S. Ct. 439, 444 (1983); *see NLRB* v. *United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industries*, 704 F.2d 1164, 1166 (9th Cir. 1983).

But "'the deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.'" *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 104 S. Ct. at 444 (quoting *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965)).

Therefore, although we should uphold the Board's reasonable and defensible constructions of the NLRA, we must not "'rubber-stamp ... administrative decisions that [we] deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying [the] statute.'" *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 104 S. Ct. at 444 (quoting *NLRB* v. *Brown*, 380 U.S. 278, 291 (1965)); *see Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971).

For the reasons that follow, we believe that the Board's holding, including its 30-day rule,[3] frustrates federal labor policy in important respects.

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[3] We question the wisdom of calling the 30-day standard a "rule." Only two members concur in it; the other three oppose it. Yet the concurring and dissenting opinions refer to the two-member plurality as a "majority," *see, e.g.*, 263 N.L.R.B. at 987 (Van de Water, Chairman & Hunter, Member, concurring); *id.* at 993 (Jenkins, Member, dissenting), and imply that the 30-day standard is now the law of the Board.

ANALYSIS

A. National Labor Policy and Union Discipline

Our national labor policy is built on the premise that employees can bargain most effectively for improvements in wages, hours, and working conditions by pooling their economic strength and acting through freely chosen labor organizations. *NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 180 (1967).

Congress embraced this policy when it passed the Wagner Act in 1935 because the history of the labor movement demonstrated that employees who acted collectively were far more successful in improving their lot than those who faced employers individually. *See* A. Cox, D. Bok & R. Gorman, *Cases and Materials on Labor Law* 15-17 (8th ed. 1977). But to ensure that a union could not abuse its position as an exclusive bargaining representative, Congress also enacted the Taft-Hartley Act of 1947 and the Landrum-Griffith Act of 1959. These laws made unfair labor practices out of union conduct coercing employees in the exercise of their § 7 rights, *see* 29 U.S.C. § 158(b)(1)(A) (1976), and preventing union members from participating fully in union affairs, *see id.* § 411(a)(2). Moreover, the Supreme Court read the labor laws as requiring a union to represent every employee in its bargaining unit fairly and adequately. *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); *Steele* v. *Louisville & N.R.R.*, 323 U.S. 192, 202-03 (1944).

In imposing these substantial fiduciary obligations on labor organizations, however, neither Congress nor the Court gave individual members license to avoid union rules designed to protect the welfare of the bargaining unit.

Congress, therefore, enacted the proviso to § 8(b)(1)(A),[4] which reserves to unions the power to

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[4] *See supra* note 2.

make reasonable rules regarding the retention and acquisition of membership. *Allis-Chalmers*, 388 U.S. at 181; 263 N.L.R.B. 984, 985 (1982) (plurality opinion). This power

> is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and "[t]he power to fine or to expel strikebreakers is essential if the union is to be an effective bargaining agent...." Provisions in union constitutions and bylaws for fines and expulsion of recalcitrants, including strikebreakers, are therefore commonplace and were commonplace at the time of the Taft-Hartley amendments.

Allis-Chalmers, 388 U.S. at 181-82 (footnotes omitted) (quoting Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1049 (1951)).

In short, federal labor policy restricts the individual employee's absolute power to order his relations with management. Instead, it vests this power in a collective representative who must protect the interests of everyone in the bargaining unit. As a result,

> [t]he complete satisfaction of all who are represented is hardly to be expected. A wide range of *reasonableness* must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Allis-Chalmers, 388 U.S. at 180 (emphasis added) (quoting *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953)).

B. The Scofield Test and Post-Resignation Discipline

In *Scofield* v. *NLRB*, 394 U.S. 423 (1969), the Supreme Court articulated a three-part test for determining when a union disciplinary rule is reasonable. A union is free to enforce a properly adopted rule that (1)

reflects a legitimate union interest, (2) impairs no policy that Congress has imbedded in the labor laws, and (3) is reasonably enforced against union members. *Id.* at 430. The Court elaborated part (2) of the test by holding that it could not enforce a rule that "invades or frustrates an *overriding* policy of the labor laws." *Id.* at 429 (emphasis added).

The Board *see* 263 N.L.R.B. at 986, suggests that this is a balancing test. It is not. *Scofield* sets out an orderly three-step analysis for determining when the Board may approve and the courts of appeals may enforce a union rule. *Scofield* says that the rule cannot be enforced unless it first meets all three conditions. *Scofield* does not invite either the Board or the courts to conduct an ad hoc weighing of the allegedly competing interests described in the main text of § 8(b)(1)(A) on the one hand, and the proviso to § 8(b)(1)(A) on the other.

For reasons that we offer below, we hold that the rule in question meets all three parts of the test and does not impair any congressional labor policy.

1. *Legitimate union interest.* Unions exist to pool the resources of employees so that the employees can bargain most effectively for improvements in wages, hours, and working conditions. For at least two reasons, post-resignation strikebreaking presents "the most appealing case for allowing unions to restrain the activities of those who have resigned." Note, *Union Power to Discipline Members Who Resign*, 86 Harv. L. Rev. 1536, 1549 (1973) [hereinafter cited as Note, *Union Discipline*].

First, post-resignation strikebreaking is a serious threat to a union's viability. It can set off a chain reaction capable of destroying the collective bargaining environment. If a union cannot punish the few employees who fail to honor the results of a strike vote, then those employees can escape their obligations to their col-

leagues in the majority simply by resigning and returning to work. If those members return to work and collect paychecks from the struck employer while the others remain on the picket line, some loyal union members will feel pressure to do the same. Eventually, a substantial number of defections could break the union and once again give the employer greater power to set the terms and conditions of employment. *See* Note, *Union Discipline*, *supra*, at 1549-51.

Second, members who participate in the strike vote and then fail to honor the result are breaching a promise to their colleagues. There is little point in taking a strike vote if the people who disagree with the outcome are free to resign anytime and escape its effects. "The strike vote itself involves mutual reliance on the promise to honor it." Note, *Union Discipline*, *supra*, at 1554; *see* 263 N.L.R.B. at 995 (Jenkins, Member, dissenting) ("In effect, the provision [for fining post-resignation strikebreakers] permits the Union to enforce its contract with each member—a contract which was freely entered into by all parties—and thereby protect its other members then exercising 'the ultimate weapon in labor's arsenal.'") (citation omitted).

The problems that post-resignation strikebreaking poses, then, implicate the serious and legitimate interests of a union attempting to represent all its members.

2. *Impairment of labor policy.* The Board creates a false conflict between the employee's right to resign union membership and the union's interest in making rules regarding the acquisition and retention of membership.[5] These rights are preserved in § 7 and § 8(b)(1)(A) of the Act, respectively. Because *both* the employee's right and the union's interest are policies

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[5] At least one Circuit, however, has agreed with the Board. *See Pattern Makers' League of North America* v. *NLRB*, No. 83-1045 (7th Cir. Dec. 21, 1983) (invalidating union rule fining members who resign to return to work for struck employer).

that have been "embedded" in the labor laws for over 35 years, neither can "impair" or "override" the other within the meaning of *Scofield*. They must—and do—coexist.

Consequently, we look beyond the non-existent conflict to the particular facts of this case. The Machinists simply fine the union member who resigns to take a job with the struck employer. The union constitution, however, does not force a member to remain a member forever or even for the remainder of the strike. Our previous finding that the rule constitutes "a restriction on a member's right to resign," *Machinists I*, 608 F.2d at 1222, means only that the rule puts some obstacles in the way of resignation. We do not dispute the employee's § 7 right to resign from the union. But we disagree with the view that it is unreasonable for the union to penalize a member for breaching certain crucial obligations—here, the duty to refrain from strikebreaking.

Relying on language in *NLRB* v. *Granite State Joint Board*, 409 U.S. 123, 217-18 (1972), the Board argues that the Machinists' rule works unfair hardship on an employee who votes to strike, walks out, and entertains second thoughts months later when he is unable to pay the bills and feed the family. We share the Board's concern but reject its remedy. If union members believe that a strike should end, they have several options. They may work within the union to persuade their colleagues, and the leadership, to end the walkout. They may resign from the union and take a job with another employer. Ultimately, they may elect new leaders who share their views, or even petition the Board to decertify the bargaining representative. But they may not betray their colleagues and expect to get away without paying a price for weakening the collective bargaining environment.

3. *Reasonable enforcement.* The Board contends that the union's rule is too harsh because it restricts resignation for a period beginning two weeks before the strike starts through the duration of the strike. We believe this restriction is not only reasonable, but also critical. First, these periods represent times when presenting a solid front to the employer is most important. Even the appearance of uncertain membership support may encourage the employer to be recalcitrant during negotiations. Note, *Union Discipline, supra,* at 1553-54.

Second, once a member decides to resign from a labor organization, the union has no effective means of discouraging him from working for the struck employer unles it can threaten to collect a fine. To a member prepared to resign, of course, the threat of explusion [*sic*] carries no weight. *Cf. Local 1255, International Association of Machinists & Aerospace Workers* v. *NLRB,* 456 F.2d 1214, 1217 (5th Cir. 1972) (union may condition readmission of expelled member on payment of fine for strikebreaking if such measure is the only way to collect the fine).

The Board argues, and we agree, that "the power of the union over the member is certainly no greater than the union-member contract." *Granite State,* 409 U.S. at 217. But the terms of the contract before us condition the member's right to resign on his promise not to break the strike. If the member can escape his obligation by pleading, when the union attempts to collect the fine, that he is no longer part of the union, then the terms of this contract mean little.

Because the union has no other practical means of enforcing its rule against a member's resigning and returning to work for the struck employer, we believe that collecting fines from members who break the rule is a reasonable means of enforcement.

CONCLUSION

For these reasons, we conclude that the union's rule fining strikebreakers is a reasonable restriction on the right to resign union membership.

Enforcement of the Board's order is DENIED.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 20-CB-3488
Case 20-CB-3491
Case 20-CB-3629

MACHINISTS LOCAL 1327, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 115 (DALMO VICTOR)
and
VIOLA LAPINSKI, AN INDIVIDUAL
and
HILDA HALL, AN INDIVIDUAL
and
POLMYRA GOMES, AN INDIVIDUAL

DECISION AND ORDER

Upon charges duly filed by Viola Lapinski, Hilda Hall, and Polmyra Gomes, the Regional Director for Region 20 of the National Labor Relations Board, acting on behalf of the General Counsel of the Board, issued complaints alleging that the Respondent Union, Machinists Local 1327, International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 115, violated Section 8(b)(1)(A(of the National Labor Relations Act, as amended (29 U.S.C. § 151, *et seq.*).[1] The Respondent filed answers to the complaints

[1] Lapinski and Hall filed their charges in Cases 20—CB—3488 and 20—CB—3491 on May 7 and 12, 1975, respectively. On September 16, 1975, the Regional Director for Region 20 issued an order consolidating those cases, a consolidated complaint, and notice of hearing. Gomes filed her charge in Case 20—CB—3629 on September 11, 1975, and the Regional Director is-

in which it admitted certain allegations of the complaints and denied others, including all those charging it with the commission of any unfair labor practices.[2]

On various dates in December 1975 and January 1976, the General Counsel, the Charging Parties, and the Respondent Union entered into a stipulation in which they agreed to certain facts relevant to the issues in this proceeding. They also agreed to waive a hearing before an Administrative Law Judge, the issuance of an Administrative Law Judge's Decision, and the presentation of any evidence other than that contained in the stipulation and the exhibits there referred to. By order dated February 20, 1976, the Board approved the stipulation and transferred the proceeding to the Board. Thereafter, the General Counsel and Respondent Union filed briefs with the Board.

The Board has considered the entire record in this case, including the parties' briefs, and makes the following:

FINDINGS OF FACT

I. The Business of the Employer

Dalmo Victor, the employer of the Charging Parties, has been at all times material a division of Textron, Inc., and has been a California corporation with a place of business at Belmont, California, where it has been engaged in the manufacture of electronic products. During the past year, Dalmo Victor sold products valued in excess of $50,000 directly to customers located outside the State of California and purchased and received supplies at its California operations valued in

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sued complaint and notice of hearing in that case on October 10, 1975. Also on that date, the Regional Director issued an order consolidating the three cases and also a notice of consolidated hearing.

[2] The Respondent Union served its answers to the consolidated complaint in Cases 20—CB—3488 and 20—CB—3491 on September 22, 1975, and its answer to the complaint in Case 20—CB—3629 on October 14, 1975.

excess of $50,000 directly from suppliers located outside the State of California. Accordingly, we find, in agreement with the parties, that Dalmo Victor has been at all times material an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction in this proceeding.

II. The Labor Organization

The Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

The Union has been the bargaining representative of employees of Dalmo Victor, herein called the Employer, since around 1949. At all times material Hall, Lapinski, and Gomes, the Charging Parties, have been employees of the Employer. On or about April 19, 1974, the Respondent called a meeting of its members, who at the time included the Charging Parties, and told them of the then newly adopted union constitutional provision which provided as follows:

> *Improper Conduct of a Member* . . . Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout within 14 days preceding its commencement. Where observance of a primary picket line is required, resignation shall not relieve a member of his obligation to observe the primary picket line for its duration if the resignation occurs during the period that the picket line is maintained or within 14 days preceding its establishment.

At all times since that meeting Hall, Lapinski, and Gomes have been aware of the constitutional provision.

In early June 1974, the Union called a meeting to take a strike vote and at that time again told its members about the constitutional provision and warned them that anyone crossing the picket line would be fined. The employees, including the Charging Parties, began an economic strike against the Employer on June 3, 1974, which strike has continued to the present. The Union has throughout the strike picketed the Employer.

On February 14, 1975, Hall and Lapinski resigned membership in the Union, and the Union received notice of their resignation on February 19. The previous day the two had returned to work at the Employer's struck plant. On May 8, Gomes submitted her resignation; the Union received notice of the resignation on May 10; and Gomes returned to work on May 12. On April 16, 1975, the Union fined both Hall and Lapinski $2,277.50 each for working behind the picket line. Gomes was, for the same reason, fined $1,125 on August 6. The amount of the fines equaled the amount each employee had received as strike benefits while out on strike.[3] It is agreed that the fines are court collectible.

The complaint alleges that the Respondent, by fining the former members for working behind the picket line, violated Section 8(b)(1)(A) of the Act. In support of this allegation the General Counsel relies primarily on the Board's decision in *O.K. Tool Company, Inc.*[4] There the union fined certain former members who had resigned during a strike, for doing struck work. The fines were alleged to be unlawful. The union defended its

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[3] As noted above, Lapinski and Hall returned to work a day before the Respondent received any notification of their resignation. This fact is not relied on by any party for any reason whatsoever and the stipulation states that no part of these two employees' fines was for crossing the picket line prior to the Respondent's receipt of notice of their resignations.

[4] *Local Lodge No. 1994, International Association of Machinists and Aerospace Workers, AFL—CIO (O.K. Tool Company, Inc.)* 215 NLRB 651 (1974).

conduct on the ground that under the terms of its applicable constitutional provision—the same one involved in this proceeding and quoted above—the fining of the "strikebreakers" was proper. A majority of the Board held, however, that not only did the "proscription of postresignation strikebreaking impair a former member's Section 7 right to refrain from concerted activity, but it also is plainly contrary to *Scofield's* requirement that union members be free to leave the union to escape membership conditions that they consider onerous."[5] It, thus, concluded that the union could not legally "levy court-collectible fines against a former member for exercising his Section 7 rights following lawful resignation from the union."[6]

There is no substantial or relevant distinction between the situation that faced the Board in *O.K. Tool* and that which is now before us.[7] Nor has the Respondent raised in this proceeding any argument or other

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[5] 215 NLRB at 653. The reference is to the Supreme Court's decision in *Scofield* v. *N.L.R.B.*, 394 U.S. 423 (1969).

[6] 215 NLRB at 653. The Board also found in that case that the union unlawfully threatened to fine former members for postresignation "strikebreaking," as well as unlawfully fining them for such conduct. There is no allegation of unlawful threats in the present case.

[7] The Respondent points to the fact that in *O.K. Tool*, unlike in the present case, the union had misstated to the fined employees the meaning of the "Improper Conduct of Member" constitutional provision and claims that this is a factual difference warranting a different result in this case. The rationale of the concurring opinion in *O.K. Tool* did rest in part on the fact of misrepresentation. However, the majority decision did not turn at all on that fact but treated it as irrelevant by ignoring it. As precisely set forth, the issue decided by the majority in *O.K. Tool*—and it is the same issue as that before us now—was "whether or not a labor organization may lawfully ... impose ... a court-collectible fine on a former member, who has tendered a valid resignation, for conduct following his resignation which is prohibited by the union's constitution but protected by Section 7 of the Act." 215 NLRB 651, 652.

consideration showing that the Board's decision in that case was wrong or otherwise inadvisable. Consequently, we find for the reasons set forth in the majority decision in *O.K. Tool* that the Respondent by fining former members Lapinski, Hall and Gomes for their postresignation "strikebreaking" violated Section 8(b)(1)(A) of the Act.

Our dissenting colleagues disagree with our result here essentially on the ground that they would find that the Union's constitutional provision forbidding postresignation "strikebreaking" was actually a restriction on the employees' right to resign from the Union. From this Member Jenkins concludes that such restriction should be held proper—and thus the fines at issue in this case lawful—as "measures . . . within the ambit of the Union's control over its internal affairs" and both he and Member Murphy view the restriction as a means of protecting the strike as a legitimate economic weapon. If indeed the constitutional provision here involved and quoted above were truly a restriction on the right to resign, then, as the dissenters in effect claim, we would be faced with an issue the Supreme Court expressly left open in its *Scofield* and *Granite State* decisions,[8] and thus with determining if such a restriction as enforced here with fines is lawful. But that issue is not before us, and we express no opinion on it. For the Union's constitutional provision is clear and unambiguous in its language, and that language places no clear restriction, no subtle restriction, no restriction by implication, and, in sum, no restriction whatsoever upon an employee's right to resign. Affirmatively, the provision seeks to do

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[8] *Scofield* v. *N.L.R.B., supra; N.L.R.B.* v. *Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL—CIO* [*International Paper Box Machine Co.*], 409 U.S. 213 (1972). In the latter case the Court in finding fines on former members unlawful cautioned that it was not deciding "to what extent the contractual relationship between union and member may curtail the freedom to resign." 409 U.S. at 217.

what its plain language says it seeks to do, that is, control, not resignations by members, but rather post-resignation conduct, i.e., the conduct of employees who are no longer members.[9] Consequently, as we have found above, the Union's fining the Charging Parties for crossing the picket line was, as we held in identical circumstances in *O.K. Tool*,[10] unlawful under the Su-

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[9] Our construction here not only is required by a plain reading of the language involved but also is wholly consistent with the actual position taken by the Union in stipulating that the Charging Parties did indeed resign as of the date it received their written resignations. Member Jenkins' discussion seeking to avoid the implications of this stipulated fact initially concedes, as it must, that the employees did effectively resign on such date. This concession is all that is necessary to reveal the unsubstantiality of his position. As for his other observations concerning the stipulated resignations, they are, even if true, largely irrelevant but seem to us to be little more than an involved rationalization intended to resolve the discrepancy between his theory of the case and the actual facts. Finally, we might add that, if the Union had intended to place restrictions on the right to resign, it could have done so directly and unambiguously, but this it has not done.

[10] Member Jenkins states in effect that in *O.K. Tool* the majority failed to realize that the Supreme Court decisions on which they relied (*Scofield* and *Granite State*, both cited *supra*) involved contexts "in which the union had placed no restrictions on the right of a member to resign" and seems to imply that if they had realized this the majority would have reached a different result there. We fail to see how he could conceivably have come up with any such idea. Even a most casual reading of the *O.K. Tool* decision shows that the majority considered the constitutional provision in dispute to be a restriction on post-resignation conduct, not a restriction on resignation itself. Consequently, the *O.K. Tool* "context" was the same as the "context" in the cited Supreme Court cases. Thus, even if the *O.K. Tool* majority did not realize, as Member Jenkins claims, that those Supreme Court cases involved contexts with no restrictions on the right to resign, we fail to see what difference it would have made to the majority's resolution of the issues before them. Of course, the majority was well aware that neither their decision nor the Supreme Court decisions were concerned with the issue of restrictions on resignation, for they stated that

preme Court's decision in *Scofield* and *Granite State*. The contrary result championed by our dissenting colleagues is based on an obvious misconstruction of the matters here before us.[11]

The dissenters treat the notice and consent required for enforcement of the union-member contract[12] as no more than an annoying technicality. Otherwise they could not seriously argue that the reasoning necessary to equate the Respondent's restrictions on postresignation activity with restrictions on resignation is consistent with reasonable notice that members may not resign during a strike. The same provision was described to the Supreme Court in *Boeing* as explicitly binding "a member, notwithstanding his resignation, to

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such an issue was "not raised by the facts of this proceeding." 215 NLRB at 653.

[11] Member Jenkins' position might also be construed as a claim that the fines are legitimate because the Union's constitutional provision provides for resignation subject to automatic revocation in the event a former member breaches his obligation not to cross a picket line—a rather novel concept—or provides only for limited resignation, i.e., resignation for all purposes other than noncompliance with the no-strikebreaking clause. Both of these rather unrealistic constructions come down to much the same thing and would in substance represent, if correct, an attempt by the Union to extend an obligation of membership to employees who, in view of their contingent or partial resignations, no longer have any of the rights and privileges of membership. See *O.K. Tool Co.*, 215 NLRB at 653. Thus, the fines for crossing the picket line would under those theories find no sanction in the Supreme Court's decision in *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 196 (1967), and would be in conflict with the Court's statement in *Scofield, supra* at 430, to the effect that fines are lawful only against members "who are free to leave the union and escape the rule" the breach of which would result in a fine.

[12] See *N.L.R.B.* v. *Granite State Joint Board, supra* at 217, fn. 5; *Booster Lodge No. 405. International Association of Machinists & Aerospace Workers, AFL—CIO* [*Boeing Co.*] v. *N.L.R.B.*, 412 U.S. 84, 88 (1973).

abstain from strikebreaking for the duration of an existing strike."[13]

There is a distinction between postresignation restrictions and restrictions on resignation, implicitly acknowledged, if not identified, by the dissenters. A member has the right to participate in his union's affairs, but surrenders that right on resignation. The dissenters suggest nothing which would show that the Respondent continued to allow a former member to participate in its affairs "notwithstanding his resignation." The absence of that right and membership benefits was decisive in *O.K. Tool.*

Contrary to Member Murphy, we see no reason to believe that the Textile Workers interests in *Granite State* were any less legitimate than are those of the Machinists here or in *Boeing*, yet the attempts to enforce those interests were found unlawful by both the Board and the courts. The issue is not now, and has never been, whether unions have legitimate interests in restricting resignations or postresignation activity. They do. But those interests are not absolute. The issue is whether unions' attempts to protect those interests impermissibly intrude on other matters of concern under the national labor policy.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth above, occurring in connection with the Employer's operations, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has engaged in, and is engaging in, certain unfair labor practices, we

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[13] 412 U.S. at 89, fn. 9.

shall order it to cease and desist therefrom. In order to effectuate the purposes of the Act, we shall also order the Respondent to rescind the unlawful fines, to refund any money paid to it as a result of the fines, with interest computed at 7 percent per annum,[14] and to post the notice attached as an appendix to this Decision and Order.

CONCLUSIONS OF LAW

1. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By imposing court-collectible fines on former members who had duly resigned from the Union, for their postresignation crossing of a sanctioned picket line and working during a strike at Dalmo Victor, Respondent restrained and coerced employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Machinists Local 1327, International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 115,

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[14] In accordance with our decision in *Florida Steel Corporation*, 231 NLRB No. 117 (1977), we shall apply the current 7-percent rate for periods prior to August 25, 1977, in which the "adjusted prime interest rate" as used by the Internal Revenue Service in calculating interest on tax payments was at least 7 percent.

Burlingame, California, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Restraining or coercing employees who have resigned from, and are no longer members of, Respondent in the exercise of the rights guaranteed them in Section 7 of the Act by imposing court-collectible fines on such employees because of their postresignation conduct in working at Dalmo Victor during the strike which began on June 3, 1974.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes of the Act:

(a) Rescind the fines levied against Viola Lapinski, Hilda Hall, and Polmyra Gomes because of their postresignation work for Dalmo Victor during the strike which begain in June 1974, and refund to them any money they may have paid as a result of such fines, plus interest.

(b) Post at its business office and meeting halls copies of the attached notice marked "Appendix."[15] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by an authorized representative of Respondent, shall be posted by the Respondent immediately upon receipt thereof, and shall be maintained by it for 60 consecutive days thereafter in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said no-

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[15] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

tices are not altered, defaced, or covered by any other material.

(c) Mail to the Regional Director for Region 20 signed copies of said notice for posting by Dalmo Victor, if the Company is willing, in places where notices to employees are customarily posted. Copies of said notice, to be furnished by the Regional Director, after being duly signed by the Respondent's authorized representative, shall be returned forthwith to the Regional Director.

(d) Notify the Regional Director for region 20, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. August 29, 1977

/s/ John H. Fanning

JOHN H. FANNING
Chairman

/s/ John A. Penello

JOHN A. PENELLO
Member

/s/ Peter D. Walther

PETER D. WALTHER
Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

MEMBER JENKINS, dissenting:

The majority accepts the fact that the Union had a validly adopted constitutional provision which defines "Improper Conduct of Member" as including the failure of a member to observe a picket line for its duration, notwithstanding his resignation, when the picket line was established prior thereto. The majority also accepts the facts that the Union brought this provision to the attention of its members, including the Charging Parties, before the membership voted to strike, and that the Charging Parties were aware of this provision before the strike was called. In addition, the majority does not contest the Union's claims that this provision was properly adopted and reasonably enforced against the Charging Parties. The majority likewise acknowledges that the amount of the fines assessed were equal to the amount each employee had received as strike benefits while out on strike.

Despite these acknowledgments, the majority finds the Union's actions in fining the Charging Parties pursuant to the above-stated constitutional provision to be violative of Section 8(b)(1)(A) of the Act, on the strength of the Board's decision in *O.K. Tool Company, Inc., supra.* While I concurred in the similar result reached in that case based solely on the substantially different set of facts involved here, I specifically refrained from taking any position on the broader legal issue of whether or not a union may, on proper notice and in the absence of any other legal impediment, enforce an otherwise valid constitutional provision forbidding former members from returning to work following lawful resignation from the Union. That legal issue has been squarely presented here by a stipulated record which effectively eliminates any other possible misconduct on the part of the Union in terms of the manner in which the constitutional provision was adopted or implemented, or in terms of the actual notice given to the Charging Parties. Contrary to the majority both here and in *O.K. Tool*, I would conclude that the Union was

entitled to levy these fines as a means of enforcing a lawful rule, as such measures are within the ambit of the Union's control over its internal affairs.

My principal disagreement with the majority is based on the *O.K. Tool* majority's too narrow reading of Supreme Court precedent in this area. The Court in *Scofield*, *supra*, stated that it had taken and would continue to take a dual approach to the problem of evaluating the validity of union fines *vis-a-vis* Section 8(b)(1)(A) of the Act, such that properly adopted union rules, reflecting legitimate union interests, which impair no policy Congress had imbedded in the labor laws, and which are reasonably enforced against members, are permissible under that section, whereas fines against exmembers would be violations. That statement reflects the Court's view that union rules and their enforcement are an internal matter governed by contractual considerations as embodied in the union's constitution and bylaws, which are agreed to by the members in consideration for the benefits attained by membership. In support of this view, the Court has noted that union security can not compel such membership. It is also important to note, however, that in expressing this view, the Court was speaking in a context in which the union had placed no restrictions on the right of a member to resign.[16]

[16] I agree with the majority that a most casual reading of the *O.K. Tool* majority decision might lead one to conclude that inasmuch as it was found there that the factual "context" did not involve a restriction on the right of a union member to resign, the union's conduct was unlawful under prior Supreme Court precedent. However, a close reading of that decision, as well as the facts of that case—admittedly identical to the facts here relative to the constitutional provision under scrutiny—reveals the fallacy of concluding that the provision is anything other than a restriction on the right of a member to resign during an ongoing strike. Whether or not the majorities here and in *O.K. Tool* would have reached a different result if they had interpreted the provision as I do is something I can only speculate about since neither has spoken to the question left open by the Su-

While the significance of that context was apparently lost on the *O.K. Tool* majority, the Supreme Court itself acknowledged its importance in *Granite State*,[17] decided after *Scofield*, when as part of its decision finding the union's action in fining resigned members violative of Section 8(b)(1)(A), it disclaimed any consideration of the problem of construing a union's constitution or bylaws defining or limiting the circumstances under which a member may resign from the union, since no such provision was involved in either that case or in *Scofield*. Thus, the *O.K. Tool* majority, while citing the language in *Granite State* by which the Court set forth its rationale for finding the union's conduct violative of the Act, ignored the fact that in saying that a member must be "free to refrain in November from the action he endorsed in May" the Court specifically limited this principle by the possibility that a union may restrict this freedom by an express constitutional limitation, properly adopted, duly instituted, and reasonably applied. The Supreme Court never had such a factual context before it, even though the union in *Granite State* argued that such a restriction could be implied from its membership's participating in the strike vote and ratification of a poststrike rule against aiding and abetting the employer during the strike.

Similarly, the Supreme Court rejected the union's contention in a later case[18] that a general constitutional proscription against strikebreaking would suffice as an implied restriction on the right of a member to resign during a strike in order to avoid the rule against strikebreaking. Contrary to the implication of the major-

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preme Court, but instead have chosen to construe the facts in such a way as to obviate it.

[17] *N.L.R.B.* v. *Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL-CIO* [*International Paper Box Machine Co.*], 409 U.S. 213 (1972).

[18] *Booster Lodge No. 405, International Association of Machinists & Aerospace Workers, AFL-CIO* [*Boeing Co.*] v. *N.L.R.B.*, 412 U.S. 84 (1973).

ity, the 1973 decision of the Court in *Boeing* did not consider the validity of the provision here invoked by the Union, inasmuch as the Union's constitution was amended in 1974 to add the explicit language relied on here.

The Court in *Granite State* as well as in *Boeing* rejected the union's contentions since its concern with the right of a member to resign and escape the effect of union rules was too strong to permit the waiver of this right by implication. Nevertheless, the Court did leave open the question of the possible validity of a conscious waiver as embodied in a reasonable constitutional provision limiting this right, to be decided when and if a union adopted such a provision. The Court chose not to decide this issue absent a factual context, presumably so that the adoption and implementation, as well as the substantive validity of such a limitation could be examined together. Indeed, it was these surrounding circumstances in *O.K. Tool* which led me to concur in the result reached there without commenting on the substantive issue, even while recognizing that the provision, under proper circumstances, did raise the legal issue. The majority in *O.K. Tool*, however, simply read the provision before it as not limiting resignations, but only postresignation strikebreaking, thus sidestepping the legal issue left open by the Court. In so doing, it gave no justification for this interpretation except to point out that the respondent union had "conceded" that the fined employees had duly resigned before crossing the picket line.

The conclusion is therefore inescapable that, contrary to the almost exclusive reliance the *O.K. Tool* majority placed on *Granite State* and *Boeing* in deciding the issue before us, prior Court decisions do not decide the question posed by the constitutional provision here and in *O.K. Tool*. Moreover, the very fact that the Court was careful to point out that the precise legal question here was not presented by the facts in *Granite State* or in *Boeing* is clear evidence that the Court felt that nei-

ther its decisions in those cases nor its prior analysis of the general area in *Scofield* was determinative of the instant problem.

In light of the above, and inasmuch as it has been admitted that the fines were levied pursuant to the Union's constitutional provision, it becomes necessary to determine whether or not the language of that provision is in reality a restriction on a member's right to resign or, as the majority concludes, an attempt to exercise control over exmembers.

One attempt the majority makes to justify its construction of the provision is that its construction is consistent with the "actual" position taken by the Union in stipulating that the Charging Parties did resign as of the date it received their written resignations. This apparently is in reference to the Union's admitting to those allegations in the complaint concerning the tendering of resignations. While it is unquestionably correct that the resignations were stipulated as having occurred when they did and that the stipulation may be consistent with the majority's construction, such facts are in no way inconsistent with, nor do they undermine in any way, the Union's contention that these resignations were subject to the restrictions contained in the constitution. There is no reasonable action the Union could have taken, at the time these resignations were tendered, to reaffirm the binding nature of its constitutional provision conditioning these resignations on the members' prior commitment to honor the strike already begun for its duration. A failure to accept these resignations, at a time before these individuals had crossed the picket line, would have constituted a refusal by the Union to abide by its own constitution and the shoe would be on the other foot. However, the Union lived up to its contract with its members and accepted these resignations pursuant to its constitution, while the Charging Parties' subsequent crossing of the picket line was a breach of their prior commitment which imposed

the condition that their resignations did not confer the right to cross the picket line.

The majority also contends that the language of the provision places no restriction on the right to resign. This contention is incomprehensible in light of the explicit language of that provision stating that "resignation shall not relieve a member of this obligation to observe the primary picket line for its duration if the resignation occurs during the period [in question]." While there is no evidence as to what the Charging Parties understood by this, the majority does not explain in what respects the above language is either ambiguous or unclear. Although my colleagues could perhaps suggest language that would be more emphatic or more direct, I can not accept a contention that the words chosen by the Union are unintelligible or unclear, and there is no contention that these words were not fully understood by all concerned. What is clear is the foundation of the majority's position, that because the Union failed to use some favored form of language (what this language might be is not revealed), this case is outside the realm of the potentially valid action suggested by the Supreme Court.

Finally, the majority attempts to bolster its construction by labeling the result of the construction I would give the provision as constituting either contingent or partial resignation. While I agree that such characterizations might well apply, I fail to see how or why they would be "unrealistic" as the majority says, inasmuch as the result reached, no matter how you label it, is precisely what was intended by the Union and accepted by the members; and it is a result which the Supreme Court inferentially found to be potentially valid. Moreover, to say, as the majority does, that the effect of such a construction would be to limit somewhat the freedom of a member to leave the union to escape the rule is to ignore the fact that the Court in stating this principle specifically left open the possibility that some limitation might be possible if it was implemented prop-

erly within the contractual relationship between union and member. *Granite State*, 409 U.S. at 217.

There are no facts here from which it can be concluded that the Charging Parties were not fully aware of the restrictions placed upon them by the language in question, and the majority admittedly has offered no reasons why the restrictions here should not be dealt with by the Board as would any other internal union matter. Obviously some restriction of rights is involved, but when the employees freely, knowingly, and expressly agree to such limitations in order to attain the additional strength such a prior commitment gives to the strike as an economic weapon, I can perceive no reason in Board law, Supreme Court precedent, or overall labor policy to declare such a prior commitment a nullity. Rather it seems to me to be a flagrant exercise in semantic double-think to hold, as the majority does, that the words "resignation shall not relieve a member of his obligation [to honor a strike]" are not a restriction on the right to resign. What magic words would the majority have a union utilize before it will acknowledge the existence of this issue, about which it here refuses to express any opinion?

In sum, as I view the Supreme Court decisions herein as not having foreclosed the possible validity of union restrictions on postresignation strikebreaking, and since the issue here has been limited by stipulation to what amounts to a purely legal question, I would conclude on that basis that the restriction here is not contrary to Board law, excepting *O.K. Tool* as here construed, or to the policies of the Act, and would therefore find, contrary to my colleagues in the majority, that the Union's actions were not violative of Section 8(b)(1)(A). To whatever extent *O.K. Tool* is inconsistent, I would overrule it.

The intent of the provision, as a means by which unions protect the strike as a legitimate economic weapon, has been consistently accepted as valid by this Board as well as the Supreme Court. The amounts of

the fines were limited to the actual amounts of money received by the individuals from the Union when they were supporting the strike and were therefore neither excessive nor punitive.

Although the majority has seen fit to suggest that underlying the technical approach it takes throughout most of its decision there lies a question of balancing legitimate interests, it nevertheless steadfastly adheres to its basic rationale that the Union's constitution does not place any restrictions on a member's right to resign, thus essentially foreclosing any real discussion of the broader legal issue involved. If indeed the issue here is, as the majority suggests (and I agree), "Whether [the Union's] attempts to protect [its] interests impermissibly intrude on other matters of concern under the national labor policy," why is it that its holding is predicated on the conclusion that this issue is "not before us, and we express no opinion on it." The majority cannot have it both ways. Either they must recognize the fact that this case presents the essential legal and policy issue, or leave it open for decision in a later case. Accordingly, I would dismiss the complaint in its entirety.

Dated, Washington, D.C. August 29, 1977

/s/ Howard Jenkins, Jr.

HOWARD JENKINS, JR.,
Member
NATIONAL LABOR RELATIONS BOARD

MEMBER MURPHY, dissenting:

I cannot agree with the conclusion that the Respondent acted unlawfully in imposing fines under the facts of this case. I believe a union member has a right under Section 7 of the Act to resign membership from his or her union at any time, subject to such reasonable restrictions as the union through its constitution and by-laws may have duly placed on resignations and timely brought to the member's attention. The relevant Supreme Court decisions certainly do not preclude this conclusion, even if they do not expressly endorse it. See, e.g., *Scofield* v. *N.L.R.B.*, 394 U.S. 423 (1969); *N.L.R.B.* v. *Granite State Joint Board etc.*, 409 U.S. 213 (1972).

Here I find that a realistic construction of the interrelated provisions of Respondent's constitution clearly show that it contained such a reasonable and valid restriction on resignation. Thus, the restrictions on working behind a picket line during a strike are in any practical sense an obvious restriction on the right of members to resign from the Union just before or during a strike for the purpose of working at their employer's struck plant. Furthermore, I believe that such a restriction on the right to resign under the facts here is directed toward protecting a legitimate union interest and is, thus, reasonable and lawful. Consequently, in the circumstances before us, where the employees were given full and timely notice of the prior existence of a reasonable restriction on their right to resign, I would find, contrary to the majority, that Respondent in fining the Charging Parties for working behind the picket line did not, as alleged, violate the Act. I would, therefore, dismiss the complaint.

Dated, Washington, D.C. August 29, 1977

/s/ Betty S. Murphy

BETTY SOUTHARD MURPHY
Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT restrain or coerce employees who have resigned from the Union and who, in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act, work after their resignation at Dalmo Victor during the strike which began in June 1974, by imposing court-collectible fines on them for working during the strike.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

WE WILL rescind the fines levied against Viola Lapinski, Hilda Hall, and Polmyra Gomes because they worked at Dalmo Victor after their resignations from the Union during the strike which began in June 1974, and refund any money they may have paid as a result of such fines, plus interest.

MACHINISTS LOCAL 1327, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 115
Labor Organization

Date _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Building, Box 36047, 450 Golden Gate Avenue, San Francisco, California 94102. Telephone 415-556-0335.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-3723

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

MACHINISTS LOCAL 1327, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 115, RESPONDENT.

PETITION TO REVIEW A DECISION OF THE NATIONAL LABOR RELATIONS BOARD

[Filed Oct. 10, 1979]

OPINION

Before: DUNIWAY and KENNEDY, *Circuit Judges*, and BONSAL,* *District Judge*

DUNIWAY, *Circuit Judge:*

The National Labor Relations Board petitions for enforcement of its order against the respondent Union. The Board's Decision and Order are reported at 231 N.L.R.B. 719 (1977). We decline to enforce the Board's order, and remand to the Board for further proceedings.

The facts are stipulated, and the case went directly to the full Board. It held, by a 3 to 2 vote, that the Union had violated § 8(b)(1)(A) of the National Labor Re-

*The Honorable Dudley B. Bonsal, Senior United States District Judge for the Southern District of New York, sitting by designation.

lations Act, 29 U.S.C. § 158(b)(1)(A) by fining three of its members who, during a strike, had resigned, crossed a picket line, and gone back to work.

The Board's condensed statement of the stipulated facts is as follows:

> Since approximately 1949 the Union has been the collective-bargaining representative of employees of Dalmo Victor, a division of Textron, Inc., ("the company"). About April 19, 1974, the Union called a meeting of its members and apprised them, including Company employees Hilda Hall, Viola Lapinski, and Polmyra Gomes, of an amendment to the Union's constitution that provided as follows (R. 21):
>
> > *Improper Conduct of a Member:* ... Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout or within 14 days preceding its commencement. Where observance of a primary picket line is required, resignation shall not relieve a member of his obligation to observe the primary picket line for its duration if the resignation occurs during the period that the picket line is maintained or within 14 days preceding its establishment.
>
> On June 3, 1974, the Union called another meeting to take a strike vote and again told its members, including Hall, Lapinski, and Gomes, that under the provision anyone crossing the picket line might be fined. On that same day the Union commenced an economic strike against the Company and established a picket line. (R. 22.)
>
> Eight months later, on February 14, 1975, Hall and Lapinski submitted written resignations to the Union; they then returned to work, crossing the

> still-existing picket line on February 18. Gomes resigned from the Union on May 10, 1975; she then crossed the picket line [and returned to work] on May 12. On April 16, 1975, the Union fined Hall and Lapinski $2,277.50 each and on August 6, 1975 the Union fined Gomes $1,125 for working behind a picket line. (R. 22-23.) The fines are court-collectible (R. 30).

The strike was still continuing when the stipulation was executed on January 27, 1976.

In holding that the Union's constitutional provision did not justify the discipline, the Board found that the provision did not purport to restrict the members' right to resign from the Union, but rather sought only to unlawfully regulate post-resignation conduct. The dissenting Board members would have found the provision to be a restriction upon the right to resign, rather than a restriction upon post-resignation conduct. We think that the Board's holding is hypertechnical, and that the dissenting Board members state and apply the law more accurately.

We begin with the power of a union to discipline its members for crossing its lawful picket line or returning to work during a strike. A union rule against that conduct is a legitimate internal regulation of the conduct of its members, and imposition of a fine on a member is lawful under § 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A). *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 1967, 388 U.S. 175, 195. *See also N.L.R.B.* v. *Granite State Joint Board, Textile Workers Union*, 1972, 409 U.S. 213, 215.

On the other hand, a union member has a right to resign from his union, protected by Section 7 of the Act, 29 U.S.C. § 157. *N.L.R.B.* v. *Martin A. Gleason, Inc.*, 2 Cir., 1976, 534 F.2d 466, 476. Moreover, when the member does resign, "when there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the

man in the street." *Granite State*, *supra*, 409 U.S. at 217. To the same effect, see *Booster Lodge No. 405, Int'l Ass'n of Machinists* v. *N.L.R.B.*, 1973, 412 U.S. 84, 88. It is these two decisions upon which the Board majority placed its principal reliance.

However, in each case, the Court carefully restricted its holding. In *Granite State*, *supra*, Justice Douglas' opinion for the Court says:

> Neither the contract nor the Union's constitution or bylaws contained any provision defining or limiting the circumstances under which a member could resign (409 U.S. at 214).
>
> . . .
>
> We have here no problem of construing a union's constitution or bylaws defining or limiting the circumstances under which a member may resign from the union. (*Id.* at 216.)

Similarly, the Per Curiam opinion in *Booster Lodge*, *supra*, which simply followed *Granite State*, says:

> Neither its [the Union's] constitution nor its bylaws contained any provision expressly permitting or forbidding such resignation (412 U.S. at 85-86)...
>
> [We] leave open the question of the extent to which contractual restriction on a member's right to resign may be limited by the Act. (*Id.* at 88).

It was after the decision against it in *Booster Lodge*, *supra*, that the Machinists Union, in 1974, adopted the amendment to its constitution that is quoted in the stipulation of facts. The Union asserts that its purpose was to impose "contractual restrictions on a member's right to resign," the validity of which was left open in *Booster Lodge*. The Board's position is that

> [T]he Union's constitutional provision is clear and unambiguous in its language, and that language places no clear restriction, no subtle restriction, no restriction by implication, and, in sum, no restriction whatsoever upon an employee's right to re-

> sign. Affirmatively, the provision seeks to do what its plain language says it seeks to do, that is, control, not resignations by members, but rather post-resignation conduct, i.e., the conduct of employees who are no longer members.

We cannot accept this hypertechnical reading of the Union's constitution. It plainly tells its members that resignation "shall not relieve a member from his obligation to refrain from accepting employment" at the struck establishment, or from his "obligation to observe the primary picket line" during the strike or the picketing, if the resignation occurs during that time or 14 days before. Surely that is a "restriction on a member's right to resign," *Booster Lodge*, *supra*, a "defining or limiting [of] the circumstances under which a member may resign," *Granite State*, *supra*. Apparently the Board majority would confine these phrases to provisions that expressly prohibit resignation at certain times or under certain circumstances. Such a provision would be a more drastic limitation on the member's right to resign, and thus less likely to be upheld, than the provision that is before us.

In short, we conclude that this case presents the question reserved by the Court in *Granite State* and *Booster Lodge*. We answer that question in part, by concluding that the provision before us defines or limits the circumstances under which a member may resign, and is a restriction on a member's right to resign.

The next question is whether the provision, construed as we construe it, is valid. Obviously, that question was not reached in *Granite State* or *Booster Lodge*. It was expressly reserved by the Board majority in this case (231 N.L.R.B. at 720). We should give the Board, the expert body in the field of labor relations, an opportunity to consider and decide the question. *See N.L.R.B.* v. *Food Store Employees Union*, 1974, 417

U.S. 1, 8-9; *Mohland* v. *N.L.R.B.*, 9 Cir., 1968, 394 F.2d 701, 704.

The petition for enforcement of the Board's order is denied. The case is remanded to the Board for further proceedings consistent with this opinion.

KENNEDY, *Circuit Judge*, dissenting:

I do not agree with the majority that the Board's decision is simply a hypertechnical construction that can be ignored. I believe there is great substance to the distinctions the Board makes, and I respectfully dissent.

The provision of the union constitution in question here seeks not to condition resignations by members, but rather to control the post-resignation conduct of employees who are no longer union members. I submit it is unlawful for a union to fine a former member for post-resignation conduct otherwise protected by § 7 of the Act. *Booster Lodge No. 405, Int'l. Ass'n of Machinists* v. *N.L.R.B.*, 412 U.S. 84, 88 (1973); *N.L.R.B.* v. *Granite State Joint Board, Textile Workers Union*, 409 U.S. 213, 215 (197)). The majority suggests that, because the Union's constitution specifically prohibits former members from returning to work following resignation during a strike, *Booster Lodge* and *Granite State* are not applicable. It concludes that the right of a labor organization to maintain solidarity during a strike and to prescribe its own rules with respect to the acquisition and retention of membership must take precedence over whatever section 7 rights its former members may have to abandon a lawful strike and return to work.

In holding that it would not imply limits on an employee's right to resign, the Supreme Court in *Granite State* and *Booster Lodge* reserved the question whether an explicit constitutional provision or bylaw specifically limiting the right to resign would be valid. These cases did not suggest, however, that restrictions on post resignation conduct, even if contained in explicit constitutional provisions, might be valid. Both *Booster Lodge* and *Granite State* hold that the disciplinary power of a union is restricted to those employees who are members of the union. Once that relationship is dissolved, "the union has no more control over the former member

than it has over the man on the street." *Granite State*, 409 U.S. at 217. When a member "lawfully resigns" from the union, "its power over him ends." *Id.* at 215. Once having resigned his membership, an employee again becomes fully protected by section 7 in refraining from participation in a strike, and the imposition of a court-collectible fine for working during a strike violates section 8(b)(1)(A). *Booster Lodge*, 412 U.S. at 87-88; *Scofield* v. *NLRB*, 394 U.S. 423 (1969). The Supreme Court thus has employed the concept of membership to delineate in sharp relief the bounds of union authority. There is no dispute in this case that the employees had submitted valid resignations, thereby terminating their union membership. Indeed, the Union stipulated that the charging parties did effectively resign as of the date it received their written resignations. This concession is all that is really necessary to reveal the lack of substance in the Union's position regarding the characterization of the constitutional provision. If the Union had placed direct and unambiguous restrictions on the right to resign, the case might be different, but it did not do so. The logic of *Booster Lodge* and *Granite State* thus compels the conclusion that the union cannot control the conduct of these former members.

If the provision of the union constitution here involved were truly a restriction on the right to resign, then I agree with the majority that we would face the issue expressly left open in *Granite State* and *Booster Lodge; see also Scofield* v. *N.L.R.B.*, 394 U.S. 423 (1969). That issue is not before us, however, since the union's constitution places no restriction on a member's right to resign. It attempts to control the post-resignation conduct of former members, and even the majority recognizes that a union's power does not extend so far.

The Union's right to enforce the fines it imposes on its members is a corollary of the member's right not only to reap the benefits of continuing union membership, but also to maintain a continuing voice in the union's course of action. *Allis-Chalmers Mfg. Co.* v. *N.L.R.B.*, 388 U.S. 175, 191 (1967). No such justifications support the imposition of court-collectible fines on former members. I cannot agree that continuing membership to the extent, but only to the extent, that the "member" remains subject to union discipline is the equivalent of the "full union membership" relied upon by the Court in *Allis-Chalmers*, and relied on again in distinguishing that decision in *Granite State*. Thus, the distinction between membership or nonmembership is far more than a verbal nicety to be dismissed as lightly as the majority opinion does.

As the Board recognized in *Local Lodge No. 1994, Internat'l Ass'n of Machinists (O.K. Tool Co.)*, 215 N.L.R.B. 651, 653 (1974):

> Conformity may be none too high a price for the benefits of union membership. But the choice, at least in the absence of reasonable restrictions on resignation, is the individual's to make not the union's. Should he choose to resign and forgo the benefits of union membership, the union may not nonetheless seek to exact conformity without regard to the individual's section 7 rights.

Whether or not the union might lawfully have placed reasonable restrictions on its members' rights to resign, it did not do so here, and so I find it unnecessary for the Board on remand to consider the validity of such hypothetical restrictions. I would hold that a court may not enforce union fines levied against a former member for exercising his section 7 rights following his lawful resignation.

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

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263 NLRB No. 141
D-9206
Belmont, CA

MACHINISTS LOCAL 1327,
INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS,
AFL-CIO, DISTRICT LODGE 115
(DALMO VICTOR)

and

Case 20-CB-3488
VIOLA LAPINSKI, AN INDIVIDUAL
Case 20-CB-3491
HILDA HALL, AN INDIVIDUAL
Case 20-CB-3629
POLMYRA GOMES, AN INDIVIDUAL

SUPPLEMENTAL DECISION AND ORDER

On August 29, 1977, the Board issued a Decision and Order in this proceeding[1] in which it found that a constitutional provision adopted by Respondent, Machinists Local 1327, International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 115, did not constitute a restriction on a member's right

[1] 231 NLRB 719.

to resign from Respondent but rather constituted an unlawful attempt by Respondent to restrict the post-resignation conduct of former members.[2] Accordingly, the Board concluded that Respondent had violated Section 8(b)(1)(A) of the Act by imposing fines on the Charging Parties, Viola Lapinski, Hilda Hall, and Polmyra Gomes, for resigning their membership in Respondent and returning to work during the course of a strike. It then ordered Respondent to rescind the fines levied against Lapinski, Hall, and Gomes and to refund to them, with interest, any moneys they may have paid as a result of the unlawfully imposed fines. Thereafter, Respondent filed a petition for review of the Board's Decision and Order with the United States Court of Appeals for the Ninth Circuit and the Board filed a cross-petition for enforcement of its Order.

On October 10, 1979, the court issued its opinion in this case[3] denying enforcement of the Board's Order on the ground that Respondent's constitutional provision was, contrary to the Board's finding, a restriction on a member's right to resign and not an unlawful attempt to restrict a former member's post-resignation conduct. However, noting that the Board had not had the opportunity to determine whether the provision, as construed by the court, was valid, the case was remanded

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[2] The constitutional provision provided as follows:

Improper Conduct of a Member . . . Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout within 14 days preceding its commencement. Where observance of a primary picket line is required, resignation shall not relieve a member of his obligation to observe the primary picket line for its duration if the resignation occurs during the period that the picket line is maintained or within 14 days preceding its establishment.

[3] 608 F.2d 1219.

by the court to the Board for further proceedings consistent with its opinion.[4]

On December 12, 1979, the Board, having determined that this and another case,[5] involving the right of a labor organization to impose restrictions on a member's right to resign, presented issues of importance in the administration of the National Labor Relations Act, as amended, scheduled oral argument for January 16, 1980. Thereafter, on January 16, 1980, Respondent, the General Counsel, the Charging Parties, and the American Federation of Labor and Congress of Industrial Organizations[6] presented their oral argument before the Board.

The Board, having duly considered the entire record in this case and the oral arguments presented to it, finds as follows:

Pursuant to the court's remand, we are here asked to decide whether a union can, pursuant to an internal rule prohibiting resignations during a strike or within 14 days preceding its commencement, lawfully impose a fine on members who tendered resignations and returned to work during the course of a strike in apparent violation of the union rule prohibiting such resignations. Respondent asserts that, under the proviso to Section

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[4] We have accepted the remand from the Court of Appeals for the purpose of determining the validity of art. L., sec. III, as a restriction on resignation. We accept the court's determination that this provision is a restriction on resignation only as the law of the case. We otherwise adhere to our earlier determination that this clause constitutes a restriction on post-resignation conduct.

[5] *Pattern Makers' League of North America, AFL-CIO, and its Rockford and Beloit Associations (Rockford-Beloit Pattern Jobbers Association)*, Case 33-CB-1132.

[6] The American Federation of Labor and Congress of Industrial Organizations appeared as *amicus curiae* and argued orally on behalf of the Respondent's position.

8(b)(1)(A) of the Act,[7] its constitutional provision is valid and enforceable and that, consequently, the fines imposed thereunder are lawful. The Charging Parties, on the other hand, contend that the restriction in question unreasonably interferes with their Section 7 rights and that the attempt to impose and collect fines under such a provision violates Section 8(B)(1)(A) of the Act. We agree with the Charging Parties' contention.

Initially, we note that in *N.L.R.B.* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967), the Supreme Court held that a union may, without violating the Act, impose fines on persons who, while retaining full membership rights in the union, cross an authorized picket line and return to work during a strike in contravention of a union rule proscribing such conduct. The Supreme Court found that the right to impose such fines was incidental to the contractual relationship between the union and its members.[8] Once the member lawfully resigns, however, the union's control over that former member ceases and any attempt to impose and collect a fine from that former member for engaging in conduct prohibited by a union rule violates

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[7] Sec. 8(b)(1)(A) of the Act provides that it "shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ."

Sec. 7 of the Act guarantees to employees the right to organize and to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and also the right to refrain from such activities.

[8] In *Allis-Chalmers*, *supra*, the Supreme Court did not rely on the proviso to Sec. 8(b)(1)(A) but focused its attention instead on the legislative history of the phrase "restrain or coerce" in that section of the Act.

Section 8(b)(1)(A) of the Act.[9] In both *Granite State* and *Booster Lodge*, *supra*, the Supreme Court found that the union's constitution and bylaws contained no provision restricting a member's right to resign and that, consequently, union attempts to fine former members for crossing an authorized picket line violate Section 8(b)(1)(A) of the Act. Because of the absence of any articulated restriction on a member's right to resign, the Supreme Court in *Granite State* and *Booster Lodge* expressly left open the question, now before us, of the extent to which a "contractual restriction on a member's right to resign may be limited by the Act."[10]

Addressing this question requires us to balance two fundamental principles upon which our labor laws rest, principles that inherently conflict. The first is the right of an employee to refrain from collective activity, a right specifically codified in Section 7 of the Act. The second is the legitimate interest of a certified representative in protecting employees it represents who have joined together in collective economic activity. Reasonable rules governing the acquisition or retention of membership in the union, or resignation therefrom, are necessary to protect that interest. These concerns are fundamental to the overall scheme of the Act and are recognized in the proviso to Section 8(b)(1)(A).

Guided by the Supreme Court's interpretations in this area, we find that neither of these interests is absolute. Thus, a union may impose reasonable time restrictions on the right of members to resign from the union, to facilitate the orderly management of its affairs, including times when a strike may be imminent or is

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[9] *N.L.R.B.* v. *Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL-CIO* [*International Paper Box Machine Co.*], 409 U.S. 213 (1972); *Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO* [*Boeing Co.*] v. *N.L.R.B.*, 412 U.S. 84 (1973).

[10] 412 U.S. at 88; 409 U.S. at 217.

underway. But, in our judgment, the restrictions imposed by Respondent here are unreasonable in that they fail to protect sufficiently the interest of individual employees and are, therefore, impermissible, and we so find.

A union's responsible and operational effectiveness is a key component of national labor policy and enables it to better represent the majority of its members in the collective-bargaining process. A union's most powerful economic weapon—the strike, approved by a majority of its members—is a right embedded in the Act. For a union to determine effectively whether to exercise its right to strike against an employer, it must be able to know with some degree of certainty whether solidarity amongs its members will be maintained. Indeed, the Supreme Court in *Allis-Chalmers*, *supra*, recognized that a union's interest in solidarity constitutes a fundamental part of our Federal labor policy. The Court there noted that:

> Integral to this federal labor policy has been the power in the chosen union to protect against erosion of its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when the members engage in strikes.[11]

A literal reading of Section 7 might appear to permit a union member employee to pick and choose among the union actions he wishes to support without fear of union-imposed sanctions for refusing to participate in collective activities of which he does not approve. It is already settled, however, that Section 7 is not nearly that sweeping. The Supreme Court's endorsement of the proposition in *Allis-Chalmers*, that a union may discipline members for crossing a picket line, lays to

[11] 388 U.S. 175, 181.

rest any claim to an absolute right to refrain from union activity, and supports our finding that certain limited restrictions may be imposed on the right to resign from a union.

It is therefore apparent that a union's need to reflect the continuing will of a majority of its members, especially during a strike, reflects not only a legitimate union interest but also implements a right inherent in the statutory scheme of our labor laws. This does not mean, however, that any rule which furthers this legitimate union interest can be deemed to be valid and enforceable.

Although, as Respondent correctly points out, the proviso to Section 8(b)(1)(A) of the Act leaves it free to enact rules pertaining to the acquisition and retention of membership, the Supreme Court has found that "if the rule invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating Section 8(b)(1)."[12] That overriding interest is the right of an individual employee, once having joined a union, to resign from membership, which may therefore be subject only to a reasonable time limitation.

Respondent's rule prohibiting resignations during the entire course of a strike or within 14 days preceding its commencement does indeed constitute an intrusion into an employee's Section 7 right to resign. Consequently, we must determine if that rule is a reasonable restriction or whether it impermissibly contravenes other matters of concern under the national labor policy.[13]

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[12] *Scofield, et al.* v. *N.L.R.B.*, 394 U.S. 423, 429 (1969).

[13] In Member Fanning's view the issue in these cases is the right of an employee to exercise his Sec. 7 right to refrain from collective activity by working during a strike. Union coercion of an employee in the exercise of that right is, *prima facie*, a violation of Sec. 8(b)(1)(A). However, an employee who has joined a labor organization, enjoys full membership in that organiza-

As noted, Section 7 of the Act specifically grants employees the right to refrain from concerted activities. This right to refrain, as the Ninth Circuit correctly points out, encompasses the right of a member to resign from a union having once joined.[14] Further, this right to resign is not forever and irrevocably lost merely because an employee chooses to become a union member.[15] On the other hand, the right to resign is not a right to instantaneously abandon the union and the fellow members who have determined to exercise collectively their protected right to strike. A union faced with resignations during a strike maintains a continuing obligation to represent all employees in the unit, and to protect the interests of those employees who maintain their membership in the union and continue to honor

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tion, and has agreed not to engage in strikebreaking, may be disciplined by internal union sanctions for violation of that undertaking. *N.L.R.B.* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175. Once the employee lawfully resigns from the union, the union's power over him ends. *N.L.R.B.* v. *Granite State Joint Board*, 409 U.S. 213. The significance of membership in this context is simply as a defense to what otherwise would be a plain unfair labor practice: coercion or restraint of an employee in the exercise of a Sec. 7 right to work during a strike. The question is not the legality of restrictions on resignation, but rather whether or not the restrictions are effective in this context. Thus, in Member Fanning's view, it is the right to refrain from collective activity by working despite a strike—not the "right" to resign—which must be balanced against the right of the labor organization and the striking employees to wage an effective strike.

[14] 608 F.2d 1219, 1221. See also *N.L.R.B.* v. *Martin A. Gleason, Inc.*, 534 F.2d 466, 476 (2d Cir. 1976). Member Fanning does not here endorse the view that there is an independent Sec. 7 right to resign from a labor organization; divorced from the employment relation, membership is an internal union matter.

[15] See *Local 1384, United Automobile, Aerospace, Agricultural Implement Workers, UAW (Ex-Cell-O Corporation)*, 227 NLRB 1045, 1050 (1977).

the strike. Thus, important statutory and policy considerations compel us to balance the right to resign against the legitimate interest of the union, and the majority of its membership which supports the strike, in maintaining its effectiveness. We cannot, as the Charging Parties would have us do, read Section 7 in isolation from the rest of the Act.

In view of the balancing of interests required, we turn to the question of whether a union rule may permissibly differentiate between strike and nonstrike periods. The Supreme Court, in *Scofield*, *supra*, stated that union members must be free to leave a union to escape membership conditions that they consider onerous.[16] We find nothing in that decision or, indeed, in any of the subsequent Supreme Court decisions concerning this issue, to suggest that a member's right to leave the union and escape the rule could be limited to periods when a strike is not in progress. Rather, quite the converse appears true. In *Granite State*, the Supreme Court recognized that there may be circumstances under which a member might feel compelled to resign during a strike:

> Events occurring after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind. The likely duration of the strike may increase the specter of hardship to his family; the ease with which the employer replaces the strikers may make the strike seem less provident.[17]

The Court, noting that there were no restraints on a member's right to resign in that case, went on to state that "the vitality of Section 7 requires that the member be free to refrain in November from the actions he endorsed in May and that his Section 7 rights are not lost

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[16] See *Local Lodge No. 1994, International Association of Machinists and Aerospace Workers, AFL-CIO (O.K. Tool Company, Inc.)*, 215 NLRB 651, 653 (1974).

[17] 409 U.S. 213, 217.

by a union's plea for solidarity or by its pressures for conformity and submission to its regime."[18]

Clearly then, the Supreme Court's remarks in *Granite State*, read in conjunction with the *Scofield* requirement that union members must be free to leave the union and escape the rule, lead inescapably to the conclusion that a member's right to resign from a union applies both to strike and nonstrike situations.[19] We hold today that a union rule which limits the right of a union member to resign only to nonstrike periods constitutes an unreasonable restriction on a member's Section 7 right to resign.

In sum, the balancing of competing interests expressed in the Act has led us to find that the right of union members to resign is not absolute. A union may place some reasonable limitation on the right to resign so long as such rules are applicable during both strike and nonstrike periods. In assessing the reasonableness of such rules, we recognize that in a strike context a union may need to reassess its bargaining strategy, to adjust its conduct at the bargaining table, and to consider whether to commence, or to continue, a strike in the face of one or more resignations based on members' unwillingness to support the strike. Moreover, there may also be administrative matters associated with the termination of membership which the union is entitled to a reasonable period to complete.

Accordingly, in order to vindicate its vital interest in assessing its strength throughout the course of a strike, and to protect those employees who have committed themselves to exercise their right to strike, we find that a union is entitled to reasonable notice of the effec-

[18] *Id.* at 217-218.

[19] Indeed, the Board in *Ex-Cello-O*, *supra*, found unenforceable a union rule that, *inter alia*, accorded no weight to the competing considerations which might have necessitated the resignation of members during a strike.

tive date of resignations which occur immediately before or during a strike.

We realize that what may constitute a reasonable period for protecting such institutional interests under one set of circumstances may be unreasonable under another. Nonetheless, we find it salutary to set forth a general rule for the behavior of parties in this area. Having carefully considered the competing interests involved, we find that a rule which restricts a union member's right to resign for a period not to exceed 30 days after the tender of such a resignation reflects a reasonable accommodation between the right of union members to resign from the union and return to work, and the union's responsibility to protect the interests of employees who maintain their membership, as well as its need to dispose of administrative matters arising from such resignations.[20] Such a rule gives clear guidance to employees and unions alike concerning their respective responsibilities and further adds stability to the field of labor relations.[21]

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[20] Obviously, where the member has not been apprised of the existence of such a rule prior to tendering this resignation, then the member's resignation becomes effective immediately rather than upon the expiration of the 30-day period following such tender of resignation. See *General Teamsters Local 439, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Loomis Courier Service, Inc.)*, 237 NLRB 220, 223 (1978); *Ex-Cell-O Corporation*, 227 NLRB at 1048. Further, where the members have been apprised of the existence of such a rule, the running of the 30-day period before the resignation becomes effective must be triggered solely by the member's notice to the union, and not contingent on any other obligations.

[21] We realize, however, that under extraordinary circumstances, a union may need more than the 30 days found reasonable herein to dispose of the administrative matters arising from the resignations. In those cases, the Board will determine whether or not circumstances exist warranting a longer period of time.

As stated above, the Ninth Circuit found that the constitutional provision in question here constitutes a restriction on resignations.[22] We conclude that Respondent's constitutional provision as a restriction on resignations is unenforceable. Thus, Respondent's rule permits union members to resign only if the resignations are submitted no later than 14 days preceding the commencement of a strike. However, if a member chose not to exercise his right to resign or, for whatever reason, failed to do so prior to the 14-day period preceding the strike, the member was locked into the strike and prohibited from resigning until the strike ended. Such a rule is clearly contrary to our finding here and cannot be enforced. Consequently, Respondent's attempt to impose and to enforce fines on the Charging Parties prusuant to such a rule violates Section 8(b)(1)(A) of the Act. Accordingly, the Respondent shall be ordered to comply with the Board's Order as set forth in the underlying Decision herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Machinists Local 1327, International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 115, Burlingame, California, its officers, agents, and representatives, shall take the action set forth in the Board's Order at 231 NLRB 719, dated August 29, 1977.

Dated, Washington, D.C. September 10, 1982

JOHN H. FANNING, *Member*

DON A. ZIMMERMAN, *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

[22] We adopt this finding as law of the case only. See fn. 4, *supra*.

CHAIRMAN VAN DE WATER and MEMBER HUNTER, concurring:

We agree with our colleagues in the majority that Respondent violated Section 8(b)(1)(A) by its imposition of fines against employees who resigned their union membership and returned to work during the strike. We also agree that Respondent's constitutional provision is an unreasonable restriction on the members' right to resign from the Union. Unlike our colleagues, however, we would not find reasonable a 30-day limitation on the effective date of an employee's resignation from a union.[23] As set forth below, we believe the 30-day rule promulgated by the majority is an arbitrary exercise of this Board's authority that is premised upon faulty analysis and rationale. The few arguments presented in support of the rule, in our view, are contrary to fundamental principles embodied in our Act, inconsistent with the teachings of relevant Supreme Court decisions, and represent a transparent effort to achieve a legislative result rather than a reasoned legal conclusion. Contrary to our colleagues, we would find any restriction imposed upon a union member's right to resign to be unreasonable and, therefore, we would find the imposition of any fines or other discipline premised upon such restrictions to be violative of Section 8(b)(1)(A).

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[23] Although our response to the majority is cast in terms of the majority's 30-day rule, we note with dismay that the "rule" is not so precisely contained. Thus, in fn. 21 of its Decision, the majority states that "extraordinary circumstances" may justify a restriction of longer than 30 days. Accordingly, despite the expressed desire for a "salutary" rule that provides "clear guidance," the majority has constructed a loophole tailor-made for enterprising litigators that will insure continued litigation and uncertainty in this area.

The starting point for meaningful analysis of the issue presented here is the quartet of cases[24] decided by the Supreme Court that examine the union's authority to enforce its rules against member and nonmember employees within the confines of Section 8(b)(1) and related provisions of the Act. A rather simple framework can be constructed from these holdings: (1) If an employee is not a full union member, the union may not enforce its rules against that employee; (2) if an employee is a full union member the union can, within specified limits, enforce its reasonable rules against the employee-member; and (3) if an employee resigns from the union, the union loses its authority to enforce its rules against the employee. Simply stated, the question presented here is whether a union can lawfully enforce a rule that restricts an employee's ability to place himself into the third category. In other words, can a union rule be used to compel an employee to remain subject to union discipline for 30 days beyond the employee's expressed desire to sever ties with the union?[25]

In resolving the issue before us, we believe the majority has failed to look beyond the Court's specific holdings and examine the principles and concepts which

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[24] *N.L.R.B.* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967); *Scofield, et al.* v. *N.L.R.B.*, 394 U.S. 423 (1969); *N.L.R.B.* v. *Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL-CIO* [*International Paper Box Machine Co.*], 409 U.S. 213 (1972); *Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO* [*Boeing Co.*] v. *N.L.R.B.*, 412 U.S. 84 (1973).

[25] Concededly, the Court has not specifically passed upon the precise issue of whether a union may restrict its members' right to resign. This does not, however, give rise to what appears to be a tacit assumption by the majority, i.e., that the Board has free rein to fashion a rule that satisfies some personal sense of equity and balance. Although the actual holdings of the Court may not bind us here, the principles established in reaching those holdings cannot be ignored.

led to the particular results. For the Court's decisions contain findings and determinations that are clearly applicable to the issue before us. Indeed, the Court has established a specific test, largely ignored by the majority, by which the lawfulness of a union's enforcement of its rules against members and nonmembers is to be tested. We believe that a proper application of these principles and the specific test prescribed by the Court effectively preclude this Board from sanctioning a rule that restricts the right of resignation.

In *Allis-Chalmers*, the Court held that a union could discipline its full members for returning to work during a strike. In the simplest terms the Court ruled that a union's reasonable enforcement of a legitimate rule against its full members does not constitute restraint and coercion within the meaning of Section 8(b)(1).[26] In so ruling, the Court articulated a bright line distinction between "internal" and "external" union actions with the former being insulated from the proscriptions of Section 8(b)(1). The Court defined internal actions as those applying to full union members pursuant to a nonarbitrary rule aimed at achieving a legitimate union

[26] In its characterization of the Court's holding, we fear the majority has confused the Court's ruling with its own desire to reach a particular result. Thus, the majority states, "The Supreme Court's endorsement of the proposition in *Allis-Chalmers*, that a union may discipline members for crossing a picket line, lays to rest any claim to an absolute right to refrain from union activity, and supports our finding that certain limited restrictions may be imposed on the right to resign from a union." In reality, as noted above, the Court held only that such union discipline of its full members is not restraint and coercion within the meaning of Sec. 8(b)(1). While this holding may well mean that a full union member does not have an absolute right to refrain, without penalty, from concerted or other union activities, it simply does not necessarily follow that nonmembers do not enjoy an absolute right to refrain or that once a member acts to sever ties with the union that his Sec. 7 rights are any less absolute than if he never had joined the union.

objective.[27] External actions, i.e., those proscribed by Section 8(b)(1), were defined as those aimed at interfering with an employee's employment status[28] or at interfering with the rights of nonmembers or employees outside the bargaining unit.[29] Having established this distinction, the Court found that the union's enforcement of its rules prohibiting the return to work during a strike against its full members was an internal matter and, therefore, insulated from the proscriptions of Section 8(b)(1).

Significantly, for our purposes here, the Court's establishment of a dichotomy between "internal" and "external" matters by which it sanctioned union restrictions on employee-members returning to work during a strike was not predicated upon any "balancing" of conflicting rights between unions and employees. Nor was the decision predicated upon a construction of Section 8(b)(1)(A)'s proviso which allows a union to establish rules for the acquisition or retention of membership. Instead, the Court's ruling was premised upon a detailed review of the act's legislative history and an analysis of the Act's interrelated provisions. Accordingly, the decisive importance of whether a union action is internal or external in nature in determining whether enforcement of a union rule violates Section 8(b)(1)(A) is a concept embedded in the very fabric of our Act.

The concepts established in *Allis-Chalmers* were reiterated and expanded in *Scofield* where the Court again sanctioned the enforcement of what was determined to be a legitimate union rule on the basis that it was an internal union matter.[30] In so doing, the court

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[27] 388 U.S. at 195.

[28] *Ibid.*

[29] *Id.* at fn. 25 and accompanying text.

[30] The union rule at issue imposed production ceilings and provided that union members who exceeded these ceilings would be subject to fines.

reiterated that a union's authority to discipline employee-members is limited to actions that are purely internal in nature.[31] In addition, the Court, for the first time, precisely articulated the test to be utilized in evaluating the lawfulness of attempts to enforce union rules. Thus, the Court held that:

> § 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has embedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule.[32]

In *Granite State*,[33] the Court confronted a situation where the union sought to enforce its legitimate rule against returning to work during a strike in an external manner, i.e., against nonmembers. Applying the *Scofield* test, the Court found that such efforts violated Section 8(b)(1)(A). Because, in our view, the Court's decision in *Granite State* effectively undermines the purported bases for establishing a 30-day limit on resignations, we feel it is necessary to give that decision more than the cursory treatment provided by the majority.

In *Granite State*, the union membership, several days before the existing collective-bargaining agreement expired, authorized a strike if agreement on a new contract was not reached by a specific date. No agreement was reached and a strike commenced. A few days into the strike the employees met and *unanimously* adopted a resolution which provided that a member who "aided or abetted the Company during the strike" would be subject to a fine of up to $2,000. Six weeks into the strike, two members resigned their

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[31] 394 U.S. at 435-436.

[32] *Id.* U.S. at 430.

[33] 409 U.S. 213 (1972).

union membership and returned to work. Beginning 6 months later, 29 members resigned and returned to work. The union imposed fines against all 31 employees.

The Board held that the fines against all 31 employees violated Section 8(b)(1)(A).[34] The Court of Appeals for the First Circuit, however, denied enforcement of the Board's Order.[35] The First Circuit reasoned that, because the employees had mutually relied upon each other's commitment to strike, all employees were bound to honor the strike under a "mutual subscription" theory. The court also advanced the theory that a union's interest in strike solidarity could be reconciled with Section 7's right to refrain by treating an employee's agreement to join a strike and impose sanctions for strikebreaking as a waiver of his or her Section 7 right. Responding to the *Scofield* test, the First Circuit explained that it did not read *Scofield* as requiring that a union member be "free to leave the union and escape the rule" at any time and under all circumstances. Nor did the court find a deleterious impact on Federal labor policy, since the court concluded that the employee-members had waived their Section 7 rights.

In an eight-to-one decision,[36] The Supreme Cout reversed the First Circuit and found that the fines imposed violated Section 8(b)(1)(A). In its decision, the Court began by reiterating the *Scofield* test and by again emphasizing the distinction between a union's internal and external actions. As for the latter concept, the Court stated:

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[34] 187 NLRB 636 (1970).

[35] 446 F.2d 369 (1st Cir. 1971).

[36] Chief Justice Burger rendered a concurring opinion which provided, *inter alia*, that "where the individual employee has freely chosen to exercise his legal right to abandon the privileges of union membership, it is not for us to impose the obligations of continued membership." 409 U.S. at 218 (Chief Justice Burger, concurring.)

> The *Scofield* case indicates that the power of the union over the member is certainly no greater than the union-member contract. Where a member lawfully resigns from a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct. That is to say, when there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street.[37]

The Court then addressed the First Circuit's contention that the employees had waived their Section 7 rights by the strike vote and the authorization of fines for strikebreaking, stating: "We give that factor little weight."[38] In this regard, and also in response to the lower court's reliance upon the union's interest in strike solidarity, the Court stated:

> Events occurring after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind. The likely duration of the strike may increase the specter of hardship to his family; the ease with which the employer replaces the strikers may make the strike seem less provident.... [W]e concude that the vitality of § 7 requires that the member be free to refrain in November from the actions he endorsed in May and that *his § 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime.* [409 U.S. at 217-218. Emphasis supplied.][39]

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[37] 409 U.S. at 217.

[38] *Id.*

[39] The oft-quoted "May to November" change-of-mind period is somewhat inaccurate inasmuch as two of the fined employees resigned within 6 weeks of the strike's commencement and the fines against them were found violative of Sec. 8(b)(1)(A).

Finally, in *Booster Lodge*,[40] a unanimous Court[41] found that the union violated the Act by fining employees who returned to work after resigning their membership. In large part, the Court simply applied its past decisions in this area. Of significance, however, is the Court's disposal of the union's claim that its rule had been consistently interpreted to bind an employee to a strike notwithstanding his resignation. After noting that no such interpretation had been found by the Board and the court of appeals, the Court stated:

> But we are no more disposed to find an implied post-resignation commitment from the strikebreaking proscription in the Union's constitution here than we were to find it from the employees' participation in the strike vote and ratification of penalties in [*Granite State*]. [412 U.S. at 89.]

From the foregoing, it is plain that there are certain fundamental principles that must be applied in evaluating a union rule restricting an employee-member's right to resign for a 30-day (or any other) time period. First, the rule must be nonarbitrary and aimed at advancing a legitimate union interest. Second, there is inherent in the very fabric of our Act a bright line distinction between internal and external union actions. So long as the union action is wholly internal in nature, it may be lawful. When its reach become external, it runs afoul of Section 8(b)(1)(A). Third, a union rule can survive scrutiny only if it does not impair a policy Congress has embedded in the labor laws. Fourth, union rules that have been found lawful in the past have contained the implicit safeguard which provides that the rule must be reasonably enforced against union members who are free to leave the union and escape the rule. Finally, once an employee becomes a union member, he cannot be bound forever to the rules and

[40] 412 U.S. 84 (1973).

[41] Justice Blackmun, who was the lone dissenter in *Granite State*, rendered a concurring opinion.

coercive force of the union, but must be allowed to change his mind based upon subsequent developments. We contend that, when measured against these standards, the 30-day rule espoused by our colleagues must fall.

Unfortunately, however, before proceeding to what we deem to be the appropriate analysis, we are compelled to respond to the majority on its own terms because so many of the fundamental concepts enumerated above are ignored by our colleagues. Instead of a meaningful legal analysis, the majority presents what amounts to a seemingly self-evident syllogism which goes as follows: (1) employees have a Section 7 right to refrain from concerted activities; (2) unions have a legitimate interest in maintaining strike solidarity and protecting the interests of employees who honor a strike decision; (3) neither the employees' rights nor the union's interests are absolute; (4) if the Board selects a time period for restricting resignations, the conflicting interests will be accommodated and justice will be served. As is often the case with syllogistic arguments, the conclusion only follows if all the premises are correct. We respectfully submit that some of our colleagues' premises are fatally flawed and that purported "balancing" is little more than a preemptive striking of a compromise best left in the legislative arena.

Clearly, we agree with the first premise. The text of Section 7, by its very terms, grants employees the *right* to refrian from union and other concerted activities.[42] Nor can there be serious quarrel with the prem-

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[42] Specifically, two related Sec. 7 rights are involved here—the right to resign membership in a union, and the right to return to work during a strike. *Booster Lodge, supra*, 412 U.S. at 87-88; *Granite State, supra*, 409 U.S. at 217-218; *N.L.R.B.* v. *Machinists Local 1327, International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 115* [*Dalmo Victor*], 608 F.2d 1219, 1221 (9th Cir. 1979); *N.L.R.B.* v. *International Association of Machinists and*

ise that unions have a legitimate *interest* in maintaining strike solidarity and protecting the interests of striking employees.

The third premise is another matter, however, since there we find a fundamental flaw in the majority's analysis. For when our colleagues adopt the proposition that neither the employee *rights* at issue nor the union *interests* being advanced are absolute, they implicitly equate the express Section 7 rights of employees with a union's institutional interest in strike solidarity, thereby setting the stage for their purported "balancing" of "conflicting interests." Yet, such an equation ignores the fact that it is not the mere existence of conflict between labor disputants that mandates and justifies an "accommodation" or "balancing." Instead, the substantial diminution of express statutory rights is warranted only when the statutory right collides with a corresponding *right* of relatively equal import and legal significance.[43] We contend most strongly that the ex-

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Aerospace Workers, Merritt Graham Lodge No. 1871 [General Dynamics Corp.], 575 F.2d 54, 55 (2d Cir. 1978).

The preservation of employee freedom in this sphere is also manifested in Sec. 8(b)(2) and the second proviso to Sec. 8(a)(3). For those provisions work to insure that no employee can be compelled to become a full union member, thereby leaving an employee who so chooses free to refrain from union or other concerted activities. *N.L.R.B.* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963): "'Membership' as a condition of employment is whittled down to its financial core." Thus, the Board has held, with court approval, that a union violates Sec. 8(b)(1)(A) when it refuses to accept the resignations of employees on the ground that full membership is a condition of employment. *United Stanford Employees, Local 680, Service Employees International Union, AFL-CIO (The Leland Stanford Junior University)*, 232 NLRB 326 (1977), enfd. 602 F.2d 980 (9th Cir. 1979).

[43] There are, of course, rights of sufficient import and significance to justify the imposition of some limitations on employees' Sec. 7 rights. See, e.g., *N.L.R.B.* v. *The Babcock & Wilcox Company*, 351 U.S. 105 (1956), which strikes a balance between

press Section 7 rights of employees are surely more than mere "interests" subject to limitation because their operation somehow impinges upon the institutional desires of a union. Conversely, a union's institutional *interests*, to our knowledge, have never been elevated to the point where they stand on equal footing with, and, indeed, override and negate the fundamental protections of Section 7. Thus, under the banner of "balancing," our colleagues negate for 30 days the express employee protections afforded by one of the Act's most important provisions. One can only wonder what other rights granted by the Act will be diminished or eliminated upon the majority's discovery that they too conflict with a "legitimate interest" of a union or an employer. In short, by equating institutional "interests" with statutory "rights" and utilizing the existence of "conflict" between disputants to justify reduction of the Act's protections, we respectfully submit that our colleagues are engaging in legislating rather than interpreting our Act's intent and objectives. This they may not do.

Even granting the premise that employees' statutory rights and the union's institutional interests are subject to balancing and mutual accommodation, we suggest that the majority's rule does not give sufficient consideration to all of the relevant circumstances. Thus, it seems to us that the majority underplays the significance of the practical realities facing an employee in a strike situation that the Court enumerated in *Granite State* in support of the concept that a union member must "be free to refrain in Novembr from actions endorsed in May."[44] Indeed, as noted in footnote 39, *supra*, this period is more accurately one of 6 weeks. For nowhere in the majority opinion is there any meaningful attempt to explain why a member would not be

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employees' Sec. 7 rights and the property rights of individuals that are grounded in Common Law and the Constitution.

[44] 409 U.S. at 217-218.

free to refrain from an action he agreed to 30 days earlier but is free to do after 42 days.[45] Nor does the majority appear to take into account the Court's concern for an employee who initially supports the strike but later undergoes a change of mind because of family hardship or the relative ease with which the employer is able to secure permanent replacements.[46] Again, if we are to balance employee rights against union interests, substantially more consideration of the dilemma faced by an employee who cannot continue to adhere to a strike without placing himself and his family in dire financial straits is surely required.[47]

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[45] Indeed, apart from stating the need for a "salutary" rule that eliminates confusion, we are at a total loss in perceiving the significance of 30 days as a benchmark. Why is 10 days too short a period? Why is 31 days too long? We would hope that our colleagues have some nonarbitrary basis for the selection of this time period. For if they do not, their action is nothing more than an arbitrary act of legislative compromise.

[46] It should not be forgotten that an employer can and often does hire replacements immediately after a strike commences. While a 30-day waiting period, enforceable by substantial fines, may appear to some to be "reasonable," the real life dilemma created for an employee subjected to the rule is that his job may well be long gone by the time he is able to take any meaningful steps to retain it.

[47] When viewed in the context of the potentially severe hardships visited on employees who are precluded from refraining from a strike for 30 days, one questions the majority's willingness to adhere to the Court's admonition that, in balancing conflicting rights, any accommodation must be achieved "with as little destruction of one as is consistent with the maintenance of the other." *Babcock & Wilcox*, *supra* at 112. Surely a union is vested with sufficient lawful means of persuasion and peer pressure to preserve strike solidarity without requiring suspension of the Act's fundamental protections. In fact, if a union is unable to preserve strike solidarity through less restrictive means than sanctions that override the Act's protections, perhaps it should reconsider its decision to strike in the first place.

Apart from the fact that the 30-day rule fails in its own "balancing" premise, it also fails to withstand scrutiny under the relevant Court decisions discussed above. Initially, in this regard, it is clear that, by promulgating a 30-day restriction on resignations, this Board is seeking to redefine the internal/external dichotomy which the Supreme Court has found to be embedded in our Act's very fabric. As discussed in detail above, the Court has consistently interpreted the Act and its underlying purposes to prohibit a union from exercising its coercive power in external matters. A primary basis for defining external versus internal matters has been the fact of the employee's union membership. Yet, by allowing a union to compel an employee to remain a member subject to the union's rules and authority for 30 days beyond an expressed desire to resign, the majority has effectively altered the internal/external distinction which Congress has so carefully embedded in the Act. And the majority has accomplished this end by creating the *fiction* of continued full membership.[48] Thus, unions will be able to expand substantially their domain of authority and to regulate conduct heretofore beyond its control merely by adopting a "rule" that establishes a facade of full membership for 30 days. In other words, by a mere conven-

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[48] It bears emphasis that this fiction of continued membership arises not out of the employees' expressed desires or the practical realities of the situation but, instead, is the creation of a union rule. Thus, a boilerplate provision in a union's constitution or bylaws that can be adopted and operate in an inflexible manner, oblivious to the circumstances facing the member in a strike situation, can serve to circumscribe dramatically an employee's statutory rights and potential economic livelihood. Such "agreements" that result from union membership have accurately been termed contracts of adhesion. See *Summers, Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049; Gould, Some Limitations Upon Union Discipline Under the NLRA: The Radiation of Allis-Chalmers, 1970 Duke L.J. 1137 (1970).

tion vote, a union can transform a plainly external action into an internal one and thereby insulate itself from the intended scope and objectives of the Act.[49]

The 30-day rule also fails to pass muster under the *Scofield* test, reiterated in *Granite State* and *Booster Lodge*. Under that test, a union rule must (1) serve a legitimate union interest; (2) impair no policy Congress has embedded in the labor laws; and (3) leave members free to leave the union and escape the rule. We respectfully submit that to the extent the majority opinion even seeks to apply this test, it, once again, confuses the applicable concepts and distorts the appropriate analysis.

Plainly, a union's interest in maintaining strike solidarity is a legitimate one that satisfies the first part of the *Scofield* test. As for the second part of the test, however, the 30-day rule runs directly afoul of at least three policies Congress has embedded in the labor laws, i.e., the right of employees to refrain from concerted activities and the policy, discussed above, limiting the coercive authority of unions to wholly internal matters. Still a third policy negated by the 30-day rule is that embodied in Section 8(b)(2) and in the proviso to Section 8(a)(3) which together allow a union to compel core membership, but prohibit it from compelling full membership.

We can only presume that the majority seeks to negate these impositions on statutory policy by again relying on the union's interest in strike solidarity. Yet, the existence of a legitimate union interest is nothing more than a threshold issue in determining the lawfulness of a union rule. For if the mere existence of a legit-

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[49] It seems self-evident that merely because a union adopts a rule all conduct by employees that violates that rule is not, *ipso facto*, an internal union matter. The majority seems to forget, however, that the internal/external determination turns upon the scope and impact of the rule and not on the internal source of the rule's creation.

imate union interest is sufficient to overcome the policies Congress has embedded in the Act, why, pray tell, has the Supreme Court consistently treated the two as separate and distinct conjunctive requirements? We submit that to utilize the legitimate union interests in strike solidarity to satisfy the initial prong of the *Scofield* test, and then revive it to negate congressional policy in addressing the second prong of the test, renders the three-part test redundant and virtually useless.[50] Indeed, in *Granite State* the Court recognized that a union advanced a legitimate interest in seeking to prohibit the return to work during a strike. But the Court then moved to the second part of its test and declared that "§ 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime."[51]

Regarding the final portion of the *Scofield* test, a rule restricting resignations for 30 days is not a rule reasonably enforced against union members who are free to leave the union and avoid the rule. Nor is it mere sophistry to rely on this factor in striking down a

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[50] Here again, a major flaw in the majority's analysis springs from the faulty premise that union interests and statutory rights are coequals that can serve to negate each other and compel that a "balance" be struck between them.

[51] 409 U.S. at 218. Of course, in *Granite State* there was no union rule restricting resignation although the employees there had voted to impose sanctions on themselves for any strikebreaking activity. Thus, the only substantial difference here is a union rule adopted for the avowed purpose of restricting strikebreaking rather than an employee-adopted rule with the same objective. We fail to see how the employee rule is insufficient to negate congressional policy while a union rule with the same objective can overcome the intent of Congress. Indeed, binding an employee into forsaking his statutory rights for 30 days by invoking a union rule is yet another step removed from the employees' self-limitations found insufficient in *Granite State* and also fails to take into account the plain adhesive nature of the so-called employee/union contract. See fn. 48, *supra*.

restriction on resignation. For this prong of the test represents more than a consideration to be applied only in cases that do not involve resignation rules. Indeed, it embodied an essential safeguard in protecting individuals' Section 7 rights and limiting the coercive power of unions. Nor can that safeguard be eliminated without doing violence to the Act's interrelated provisions and to the precise objectives of Congress. In short, at least part of the justification for allowing the union to enact and enforce the rule in the first place is that the member is free to leave the union and thus escape the application of that rule. To allow a union to eliminate this safeguard is simply to cede congressional authority to various private parties.

In summary, we believe the majority's 30-day restriction on resignations is premised upon sham "balancing" that represents nothing more than an arbitrary compromise over how far a union can unilateraly abrogate individual statutory rights and the congressional scheme of labor relations. The 30-day rule runs directly counter to relevant Supreme Court precedent, ignores the test prescribed for evaluating the validity of a union's rules, and generally violates a host of principles and policies embedded in our Act.

Finally, since the majority has set forth what it would hold in an appropriate case, we shall state our view. Any union rule that restricts a member's right to resign is unreasonable and any discipline taken by a union against an employee predicated on such a rule violates Section 8(b)(1)(A). In addition, for a resignation to be valid, it must be in writing and is effective upon receipt by the union.[52] Finally, we would hold that a union may not condition a resignation upon the payment of any dues or assessments. Clearly enough, the union,

[52] We do not review such requirements as "restrictions" on resignation. Rather, they are simply the ministerial acts necessary to ensure that a member's resignation is voluntary and has, in fact, occurred.

like an employer, is able to recoup any moneys owed it through regular legal proceedings and we find no basis for holding an employee hostage by prohibiting resignations until such fiscal matters are settled.

Dated, Washington, D.C. September 10, 1982

JOHN R. VAN DE WATER, *Chairman*

ROBERT P. HUNTER, *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

MEMBER JENKINS, dissenting:

Contrary to my colleagues, I remain convinced[53] that Respondent's constitutional provision prohibiting resignations during a strike or within 14 days preceding its commencement is a reasonable and valid restriction on members' resignations, protected by the proviso to Section 8(b)(1)(A) of the Act. Accordingly, I would dismiss the complaint in its entirety.

This proceeding was submitted to the Board through a stipulation of facts. The complaint alleged that Respondent violated Section 8(b)(1)(A) by fining three of its members who, during the course of an officially sanctioned strike against the Employer, attempted to resign their membership in Respondent and thereafter crossed Respondent's picket line to return to work for the Employer. The stipulated record reveals that Respondent has been the collective-bargaining representative of the Employer's employees since approximately 1949. On or about April 19, 1974, Respondent held a meeting of its members and informed them of a then newly adopted constitutional amendment which provided as follows:

> *Improper Conduct of a Member* . . . Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout within 14 days preceding its commencement. Where observance of a primary picket line is required, resignation shall not relieve a member of his obligation to observe the primary picket line for its duration if the resignation occurs during the pe-

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[53] See my previous dissent in this proceeding, reported at 231 NLRB 719, 722 (1977).

riod that the picket line is maintained or within 14 days preceding its establishment.

At all times since that meeting, the individual Charging Parties, each of whom was an employee of the Employer, have been aware of the constitutional provision. On June 3, 1974, Respondent held another membership meeting for the purpose of taking a strike vote. Prior to the actual strike vote, Respondent again informed its members, including the individual Charging Parties, about the constitutional provision and warned them that anyone crossing the picket line could be fined. On the same date, following affirmative authorization of the membership through the strike vote, Respondent and its membership, including the Charging Parties, began an economic strike against the Employer and established a lawful picket line. The strike continued, and the picket line was maintained, during all times relevant herein. On February 14, 1975,[54] Charging Parties Hall and Lapinski resigned membership in the Union and, on February 18, returned to work at the struck plant. The Union received notice of these resignations on February 19. On April 16, the Union fined Hall and Lapinski $2,277.50 each for working behind the Union's picket line. The amount of the fines equaled the sum received by Hall and Lapinski from the Union as strike benefits during the period that they honored the picket line. Thereafter, on May 8, Charging Party Gomes submitted her resignation from membership. The Union received Gomes' resignation on May 10, and she returned to work at the struck plant on May 12. On August 6, the Union fined Gomes $1,125 for working behind the Union's picket line. Again, the amount of the

[54] Unless otherwise noted, all dates hereinafter are in 1975.

fine equaled the sum Gomes received as strike benefits while she observed the Union's picket line.[55]

The majority accepts all of the foregoing, as they must, but despite these uncontroverted facts decides today that Respondent's actions in fining the Charging Parties for violating its duly adopted constitutional provision were contrary to Section 8(b)(1)(A) of the Act, holding that the constitutional provision quoted above is *per se* illegal. I cannot agree. Rather, I would find that Respondent was entitled to levy fines against the Charging Parties as a means of enforcing a lawful constitutional provision governing retention of membership, a subject expressly excluded from the scope of Section 8(b)(1)(A) by the proviso thereto, and within the ambit of a union's control over its internal affairs.

Any analysis of the issues presented herein must begin with an examination of the Supreme Court's decisions in *Allis-Chalmers*,[56] *Granite State*,[57] and *Booster Lodge*.[58] In *Allis-Chalmers*, the Supreme Court held that a union rule prohibiting its members from crossing an authorized picket line or returning to work during the course of a strike was a legitimate internal regulation of the conduct of its members, and that neither the rule nor its enforcement against members through imposition of court-enforceable fines was violative of Section 8(b)(1)(A) of the Act. In *Granite State* and *Booster Lodge*, the Supreme Court held that sanctions against

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[55] There is no allegation that the amount of the fines was unreasonable or excessive.

[56] *N.L.R.B.* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967).

[57] *N.L.R.B.* v. *Granite State Joint Board, Textile Workers Union*, 409 U.S. 213 (1972).

[58] *Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO* [*Boeing Co.*] v. *N.L.R.B.*, 412 U.S. 84 (1973). Also, see *N.L.R.B.* v. *Boeing Co., et al.*, 412 U.S. 67 (1973).

former members who resigned their membership prior to crossing authorized picket lines were violative of Section 8(b)(1)(A) of the Act, reasoning that "when there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street."[59] It must be stressed, however, that in both *Granite State* and *Booster Lodge* the Court expressly limited its holding to factual situations where, as in those cases, there was no constitution or bylaw provision defining or limiting the circumstances under which a member could resign from the union.[60] Indeed, the Court specifically reserved for later consideration the question now before the Board; to wit, "the extent to which contractual restrictions on a member's right to resign may be limited by the Act."[61]

In examining this issue, I am guided by the explicit terms of Sections 7 and 8(b)(1)(A) of the Act, and by the Supreme Court's interpretation of Section 8(b)(1) contained in its decision in *Scofield, et al.* v. *N.L.R.B.*[62] Briefly stated, section 7 gives all employees the right to engage in union and concerted activities, or to refrain from those activities. Section 8(b)(1)(A) provides that it shall be an unfair labor practice for any labor organization to restrain or coerce employees in the exercise of the rights guaranteed them by Section 7. Importantly, however, Congress expressly limited the breadth of Section 8(b)(1)(A) by including therein a proviso specifying that such provision "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition

[59] *Granite State*, supra at 217.

[60] *Granite State*, supra at 216, 217; *Booster Lodge*, *supra* at 88.

[61] *Booster Lodge*, supra at 88.

[62] 394 U.S. 423.

or retention of membership therein. . . ." These interrelated provisions were addressed by the Supreme Court in *Scofield*. There, the Court stated that it had taken and would continue to take a dual approach to the problem of evaluating the validity of union fines under Section 8(b)(1)(A) of the Act, such that properly adopted union rules, reflecting legitimate union interests, which impair no policy Congress has imbedded in the labor laws, and which are reasonably enforced against members, are permissible under that section, whereas fines against nonmembers would violate that section. That statement reflects the Court's view, set forth in *Scofield* and in *Allis-Chalmers*, that union rules and their enforcement are an internal union matter governed by contractual considerations as embodied in the union's constitution and bylaws, which are agreed to by the members in consideration for the benefits attained by membership.

Applying the *Scofield* criteria to the constitutional provision here in issue, there can be no doubt but that the provision was properly adopted by the Union and its membership, a fact conceded by my colleagues. There also is no doubt but that the provision reflects legitimate union interests. As the Supreme Court observed in *Allis-Chalmers:*[63]

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. "Congress has seen fit to clothe the

[63] *Supra* at 180-181.

> bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents...."
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> * * * * *
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> Integral to this federal labor policy has been the power in the chosen union to protect against erosion of its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and "[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent...."

Finally, as there is no contention that Respondent's constitutional provision or the fines levied under that policy were, in any way, other than reasonably enforced against its members, there remains for consideration only the issue of whether Respondent's constitutional provision so impairs a policy Congress has embedded in the labor laws that said provision is *per se* violative of Section 8(b)(1)(A) of the Act. I conclude that this inquiry must be answered in the negative. Obviously, the constitutional provision contains some restriction on members' rights, but where, as here, the members freely, knowingly, and expressly agreed to such limitations in order to attain the additional strength such a prior commitment gives to the strike as an economic weapon, I can perceive no reason in Board law, Supreme Court precedent, or overall labor policy to declare such a prior commitment a nullity.[64] It must

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[64] For the reasons set forth in my previous dissent in this proceeding, cited above, I would overrule *Local Lodge No. 1994, International Association of Machinists and Aerospace Work-*

be stressed that the constitutional provision here in issue does not constitute a flat prohibition on all resignations, but merely restricts their effect during ongoing, lawful strikes in order to protect the Union and its members who honor their prior commitment not to engage in strikebreaking.

In effect, the provision permits the Union to enforce its contract with each member—a contract which was freely entered into by all parties—and thereby protect its other members then exercising "the ultimate weapon in labor's arsenal."[65] The member may, of course, prevail upon his fellow members to cease their concerted activity or to alter the rule but volunarily having accepted the benefits and liabilities occasioned by union membership, including an express agreement not to resign membership during a strike and thereafter cross the union's picket line, I would not permit that member thereafter to breach his contract with the union unilaterally and thereby, in effect, "have his cake and eat it too."

In sum, I would find that the Union's constitutional amendment prohibiting members from resigning during the course of a strike was a reasonable and valid restriction of resignation, protected by the proviso to Section 8(b)(1)(A) of the Act. Accordingly, I would dismiss the complaint in its entirety.

Dated, Washington, D.C. September 10, 1982

HOWARD JENKINS, JR., *Member*
NATIONAL LABOR RELATIONS BOARD

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ers, AFL-CIO (O.K. Tool Company, Inc.), 215 NLRB 651 (1974), to the extent it is inconsistent with this opinion.

[65] *Allis-Chalmers, supra* at 181.

APPENDIX E

District Lodge 160, International Association of Machinists and Aerospace Workers, AFL-CIO, and its affiliated Local Lodge 1028 (Gray Motors, Inc.) *and* Robert C. Ferguson. Case 19-CB-3982

December 16, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

Upon a charge duly filed by Robert C. Ferguson, the Regional Director for Region 19 of the National Labor Relations Board, acting on behalf of the General Counsel of the Board, issued a complaint alleging that Respondent District Lodge 160, International Association of Machinists and Aerospace Workers, AFL-CIO, and its affiliated Local Lodge 1028 violated Section 8(b)(1)(A) of the National Labor Relations Act, as amended.[1] Respondent filed an answer to the complaint in which it admitted certain allegations of the complaint and denied others, including all those charging it with the commission of any unfair labor practices.[2]

[1] The parties stipulated that District Lodge 160 is an umbrella organization for five western Washington local lodges, including Local Lodge 1028. As such, District Lodge 160 is composed of the five local lodges and provides all five with a common full-time paid staff and office in Tacoma, from which administrative services for all five local lodges are handled. The parties stipulated that District Lodge 160 and Local Lodge 1028 in effect constitute a single labor organization.

[2] The complaint and notice of hearing was issued on February 25, 1981. Respondent filed its answer to the complaint on March 9, 1981.

On June 27, 1981, the General Counsel, the Charging Party, and Respondent entered into a stipulation in which they agreed to certain facts relevant to the issues in this proceeding. They also agreed to waive a hearing before an administrative law judge, the issuance of an administrative law judge's decision, and the presentation of any evidence other than that contained in the stipulation and the exhibits there referred to. By order dated October 26, 1982, the Board approved the stipulation and transferred the proceeding to the Board. Thereafter, the General Counsel filed a brief with the Board.[3]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case, including the brief that was submitted by the General Counsel, and makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

Gray Motors, Inc., the employer of the Charging Party, has been at all times material herein a Washington corporation, with an office and place of business in Port Angeles, Washington, where it is engaged in the business of selling and servicing motor vehicles. During the past 12 months, which period is representative of all times material herein, in the course and conduct of its business operations, Gray Motors, Inc., herein called the Employer, had gross sales of goods and services valued in excess of $500,000. During the past 12 months, the Employer, in the course and conduct of its business operations, purchased and caused to be

[3] Although provided an opportunity to file briefs in support of their respective positions, it should be noted that neither the Chrging Party nor Respondent chose to do so.

transferred and delivered to its facilities within the State of Washington goods and materials valued in excess of $50,000 directly from sources outside said State or from suppliers within said State which in turn obtained such goods and materials directly from sources outside said State. Accordingly, we find, in agreement with the parties that Gray Motors, Inc., has been at all times material herein an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction in this proceeding.

II. THE LABOR ORGANIZATION

The parties stipulated and we find that Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

At all times relevant, Respondent has been the bargaining representative of employees of the Employer and Robert Ferguson has been an employee of the Employer. At all times relevant, the International constitution of the International Association of Machinists and Aerospace Workers, AFL-CIO, contained the following language set forth as article I, section 3:

> *IMPROPER CONDUCT OF A MEMBER*
>
> The following actions or omissions shall constitute misconduct by a member ... Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout if the resignation occurs during the period of the strike or lockout or within 14 days preceding its commencement.

On or about May 6, 1970,[4] at a regular union meeting of Local Lodge 1028 at which Ferguson was present, copies of a flyer containing the language set forth above were handed to members who were present. On or about June 3, at a regular meeting of Local Lodge 1028 at which Ferguson was present, a strike vote against the Employer and certain other automobile dealers in Port Angeles was taken and passed. The constitutional provision set forth above was communicated to those present, including Ferguson, at the June 3 meeting. On or about June 11 or 12, a strike commenced against the Employer and other employers. On or about June 12, Ferguson wrote to Respondent resigning his union membership and this letter was received by Respondent on June 13. On or about June 13, Ferguson returned to work at the Employer's facility and thereafter continued to work there for the balance of the strike. On or about September 26, Ferguson was served with notice of a disciplinary hearing or trial to be conducted by Respondent upon charges brought against him as a result of his working at the Employer's facility during the strike. This hearing was held pursuant to notice on October 8, and the results thereof were confirmed by vote of a majority of the members present at a meeting of Local Lodge 1028 on November 4. On November 13, Respondent, by letter, advised Ferguson that, as a result of the foregoing proceedings, he had been fined $60 per day for each of the 23 days on which he worked at the Employer's facility while Respondent was on strike against the Employer.

In the complaint, the General Counsel alleges that Respondent, by fining Ferguson in the manner set forth above, violated Section 8(b)(1)(A) of the Act.[5]

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[4] All events hereinafter occurred in 1980 unless otherwise noted.

[5] Based on the facts as set forth above, the parties stipulated that no claim is being made that Respondent violated the Act by

While neither the Charging Party nor Respondent chose to file briefs stating their positions, in his brief the General Counsel contends that the Board's recent decision in *Machinists Local 1327, International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 115 (Dalmo Victor)*, 263 NLRB 984 (1982), controls our decision in the instant case. We agree with the General Counsel.

In *Dalmo Victor*, Members Fanning and Zimmerman found that "a union rule which limits the right of a union member to resign only to nonstrike periods constitutes an unreasonable restriction of a member's Section 7 right to resign."[6] Chairman Van de Water, in his and Member Hunter's concurrence in *Dalmo Victor*, found "any restriction imposed upon a union member's right to resign to be unreasonable." As set forth above, the parties stipulated that Respondent's constitution prohibits resignations during the entire course of a strike or within 14 days preceding its commencement. Therefore, under the view expressed by Members Fanning and Zimmerman in *Dalmo Victor*, and under the view expressed by Chairman Van de Water in *Dalmo Victor*, the union provision at issue here is an unreasonable restriction on resignation. Accordingly, Respondent's attempted enforcement of its constitutional provision violated Section 8(b)(1)(A).

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levying a fine upon Ferguson for working on June 13, but rather that Respondent violated the Act with respect to the fines levied for the 22 days Ferguson worked after he had duly resigned from Respondent.

[6] Member Fanning views the issue in these cases as the right of an employee to exercise his Sec. 7 right to refrain from collective activity by working during a strike. See *Dalmo Victor*, *supra* at fn. 13. He agrees that the union constitution clause herein prohibiting resignation during a strike is an unreasonable rule.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth above, occurring in connection with the Employer's operations, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in, and is engaging in, certain unfair labor practices, we shall order it to cease and desist therefrom. In order to effectuate the purposes of the Act, we shall also order Respondent to rescind the unlawful postresignation fines, and to refund any money paid to it as a result of such fines, with interest. See *Florida Steel Corporation*, 231 NLRB 651 (1977) (see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962)). We shall also order Respondent to post the notice attached as an appendix to this Decision and Order.

CONCLUSIONS OF LAW

1. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By imposing fines on former member Robert C. Ferguson, who had duly resigned from the Union, for his postresignation crossing of a sanctioned picket line and working during a strike at Gray Motors, Inc., Respondent restrained and coerced employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the Natonal Labor Relations Board hereby orders that the Respondent, District Lodge 160, International Association of Machinists and Aerospace Workers, AFL-CIO, and its affiliated Local Lodge 1028, Tacoma, Washington, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Restraining or coercing employees who have resigned from, and are no longer members of, Respondent in the exercise of the rights guaranteed them in Section 7 of the Act by imposing fines on such employees because of their postresignation conduct in working at Gray Motors, Inc., during the strike which began in June 1980.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following afirmative action designed to effectuate the purposes of the Act:

(a) Rescind the fines levied against Robert C. Ferguson because of his postresignation work for Gray Motors, Inc., during the strike which began in June 1980, and refund to him any money he may have paid as a result of such fine, plus interest.

(b) Post at its business office and meeting halls copies of the attached notice marked "Appendix."[7] Copies

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States

of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Mail to the Regional Director for Region 19 signed copies of said notice for posting by Gray Motors, Inc., if the Company is willing, in places where notices to employees are customarily posted. Copies of said notice, to be furnished by the Regional Director, after being duly signed by Respondent's authorized representative, shall be returned forthwith to the Regional Director.

(d) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT restrain or coerce employees who have resigned from the Union and who, in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended, worked after their resignation at Gray Motors, Inc., during the strike which began in June 1980 by imposing fines on them for working during the strike.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

WE WILL rescind the fines levied against Robert C. Ferguson because he worked at Gray Motors, Inc., after his resignation from the Union during the strike which began in June 1980, and refund any money he may have paid as a result of such fines, plus interest.

DISTRICT LODGE 160, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, AND ITS AFFILIATED LOCAL LODGE 1028

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 82-7580 & 82-7701

MACHINISTS LOCAL 1327, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 115, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT,

and

VIOLA LAPINSKI, HILDA HALL, AND POLMYRA GOMES, INTERVENORS.

Nos. 83-7052 & 83-7089

DISTRICT LODGE 160, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, AND AFFILIATED LOCAL LODGE 1028, PETITIONERS,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT,

and

ROBERT C. FERGUSON, INTERVENOR.

ON PETITIONS FOR REVIEW
AND CROSS-APPLICATIONS FOR ENFORCEMENT
OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

JUDGMENT

This Cause came on to be heard on the Transcript of the Record from the National Labor Relations Board and was duly submitted

On Consideration Whereof, it is now here ordered and adjudged by the Court, that the application for enforcement of the order of the National Labor Relations Board in this Cause be, and hereby is *DENIED*.

Filed and entered: FEB. 14, 1984.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 82-7580 & 82-7701

MACHINISTS LOCAL 1327, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 115, PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT,

and

VIOLA LAPINSKI, HILDA HALL, AND POLMYRA GOMES, INTERVENORS

Nos. 83-7052 & 83-7089

DISTRICT LODGE 160, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, AND AFFILIATED LOCAL LODGE 1028, PETITIONERS,

[vs.]

NATIONAL LABOR RELATIONS BOARD, RESPONDENT,

and

ROBERT C. FERGUSON, INTERVENOR.

[Filed July 10, 1984]

ORDER

Before: TUTTLE* and MERRILL, *Senior Circuit Judges*, and PREGERSON, *Circuit Judge*.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

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*The Honorable Elbert P. Tuttle, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc and an active judge called for an en banc vote. The matter failed to receive the vote of a majority of the active judges in favor of en banc consideration. Federal Rule 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX H

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 20—CB—5272

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL LODGE 1414, AFL—CIO

AND

NEUFELD PORSCHE-AUDI, INC.

DECISION AND ORDER

Upon a charge filed by the Employer 5 March 1981 the General Counsel of the National Labor Relations Board issued a complaint 23 April 1981 against the Respondent Union alleging that it has violated Section 8(b)(1)(A) of the National Labor Relations Act.

The Complaint alleges that the Respondent imposed a court-collectible fine against Branislav Locki for engaging in certain conduct after he had submitted a written resignation of his membership in the Respondent Union. The Respondent filed an answer denying that it committed an unfair labor practice.

On 16 November 1981 the parties jointly moved the Board to transfer the instant proceeding to the Board, without benefit of a hearing before an administative law judge, and submitted a proposed record consisting of the formal papers and the parties' stipulation of facts with attached exhibits. On 14 May 1982 the Associate Executive Secretary, by direction of the Board, issued an order granting the motion, approving the stipulation, and transferring the proceeding to the Board. Thereafter the General Counsel, the Charging Party, and the Respondent filed briefs.

Upon the entire record in the case, the Board makes the following findings.

I. JURISIDICTION

The Employer, a California corporation, sells and services automobiles at its facility in Burlingame, California. During calendar year 1980 the Employer, in the course and conduct of its business operations, derived gross revenues in excess of $500,000 and purchased and received goods and materials valued in excess of $10,000 directly from points outside the State of California. We find that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We further find that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICE

The issue presented is whether the Respondent violated Section 8(b)(1)(A) by imposing a fine against employee Branislav Locki for conduct that occurred after Locki resigned his membership in the Respondent.

A. Facts

At all material times the Respondent was the exclusive collective-bargaining representative for an appropriate unit of the Employer's employees, including Branislav Locki. Locki was a member of the Respondent from approximately 1 January 1973 until about 23 January 1981, when he submitted a written resignation to the Respondent.

Prior to 1981 article L, section 3 of the constitution of the International Association of Machinists and Aerospace Workers (the pre-1981 provision) provided in pertinent part:

> Improper Conduct of a Member: . . .
>
> Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his

obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout if the resignation occurs during the period of the strike or lockout or within 14 days preceding its commencement. Where observance of a primary picket line is required, resignation shall not relieve a member of his obligation to observe the primary picket line for its duration if the resignation occurs during the period that the picket line is maintained or within 14 days preceding its establishment.

The pre-1981 provision was replaced, effective 1 January 1981, by the following provision (the 1981 provision):

Improper Conduct of a Member: . . .

Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout if the resignation occurs during the period of the strike or lockout or within 14 days preceding its commencement. Where observance of a primary picket line is required, any resignation tendered during the period that the picket line is maintained, or within 14 days preceding its establishment, shall not become effective as a resignation during the period the picket line is maintained, nor shall it relieve a member of his or her obligation to observe the primary picket line for its duration.

The stipulation reveals that Locki had actual knowledge of the pre-1981 provision but was not aware of the modifications contained in the 1981 provision.

On 8 September 1980 employees in the unit represented by the Respondent, including Locki, commenced an economic strike against the Employer. The strike lasted until approximately 1 March 1981.

About 23 January 1981 Locki personally delivered a letter of resignation to the Respondent's offices. He returned to work for the Employer about 26 January 1981.

By letter dated 30 January 1981 the Respondent filed charges against Locki alleging that he had violated the 1981 provision by returning to work during the strike against the Employer. On 23 March 1981 the Respondent imposed a $2,250 court-collectible fine against Locki.

B. Contentions of the Parties

The General Counsel and the Charging Party argue that the Board's decision in *Machinists Local 1327 (Dalmo Victor)*, 231 NLRB 719 (1977), enf. denied and remanded 608 F.2d 1219 (9th Cir. 1979) *(Dalmo Victor I)*, controls the instant case. In *Dalmo Victor I* the Board held that the pre-1981 provision of the Machinists' constitution was a restriction on postresignation conduct and that fines imposed pursuant to that provision violated Section 8(b)(1)(A).

The Respondent, relying on the Ninth Circuit's denial of enforcement of *Dalmo Victor I* and the modifications of the pre-1981 provision contained in the 1981 provision, contends that the 1981 provision is a restriction on resignations rather than a restriction on postresignation conduct. It further argues that the restriction on resignations is reasonable and valid because it advances the legitimate union interests of preserving strike solidarity and protecting the interests of employees who choose to adhere to a decision to strike.

C. Applicable Precedent

1. Dalmo Victor I and II

Preliminarily, we find it unnecessary to determine whether the Board's decision in *Dalmo Victor I* is controlling in the instant case. As stated above the 1981 provision at issue here is different from that before the

Board in *Dalmo Victor I*. Indeed the Respondent argues that the modification was made in an effort to convert the provision into a rule that the Board would recognize as a restriction on resignations. In addition we recognize that the issue of whether, or to what extent, a union can restrict its members' right to resign is an important and often recurring issue. Accordingly, we accept, for purposes of this decision, the view that the 1981 provision is a restriction on resignations.[1]

Although we find it unnecessary to apply *Dalmo Victor I* to the case before us, the Board's decision in *Machinists Local 1327 (Dalmo Victor)*, 263 NLRB 984 (1982), enf. denied 115 LRRM 2972 (9th Cir. Feb. 14, 1984) *(Dalmo Victor II)*, is directly relevant. In *Dalmo Victor II* a Board majority, pursuant to the Ninth Circuit's remand in *Dalmo Victor I*, held that the pre-1981 provision of the Machinists' constitution was an unreasonable restriction on employees' Section 7 right to resign their union memberships and otherwise refrain from Section 7 activities.[2] Although not at issue in that case, two Members (Member Zimmerman and former Member Fanning) would have found that a union could impose a 30-day restriction on its members' right to resign. Former Member Jenkins did not specifically endorse a 30-day rule, but such a restriction presumably would be valid under the view expressed in his dissent. Two Members (Member Hunter and former Chairman Van de Water), in a concurring opinion, would have

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[1] The modification of art. L, sec. 3 in the 1981 version did not alter the steps a member had to take to comply with the rule. Accordingly, we find irrelevant Locki's lack of knowledge concerning the modification in view of the fact that he was aware of the rule's substance.

[2] Former Member Fanning agreed that the restriction was unreasonable, but argued that the case did not involve employees' Sec. 7 right to resign. Former Member Jenkins dissented, concluding that the restriction was valid.

found invalid any restriction imposed on a member's right to resign or otherwise refrain from Section 7 activities. For the reasons set forth below, we conclude that the view Member Hunter and former Chairman Van de Water expressed is the correct and appropriate one, and we therefore overrule the Board's decision in *Dalmo Victor II* and its progeny. Accordingly we hold that the Respondent's restriction on resignations as set forth in the 1981 provision, as well as any other restriction a union may impose on resignation, is invalid, and that the Respondent violated Section 8(b)(1)(A) by imposing a fine against Locki pursuant to the 1981 provision.

2. *Relevant Supreme Court authorities*

Our analysis, like that of the concurrence in *Dalmo Victor II*, begins with a review of four Supreme Court decisions[3] that examine a union's authority to enforce its rules against member and nonmember employees within the confines of Section 8(b)(1) and related provisions of the Act. While none of those cases expressly address a union's authority to restrict resignations, they do establish certin applicable principles and an analytical framework for determining whether a union can restrict its members' efforts to resign.

In *Allis-Chalmers*[4] the Court held that a union can discipline its full members for returning to work during a strike. In so holding, the Court analyzed in detail certain interrelated provisions of the Act and their legislative history. The Court concluded that Congress intended to insulate from the proscriptions of Section

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[3] *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967); *Scofield* v. *NLRB*, 394 U.S. 423 (1969); *NLRB* v. *Textile Workers Local 1029 (International Paper Box Co.)*, 409 U.S. 213 (1972) (herein *Granite State); Machinists Booster Lodge 405 (Boeing Co.)* v. *NLRB*, 412 U.S. 84 (1973).

[4] 388 U.S. 175 (1967).

8(b)(1) a limited category of union actions. These union actions were termed "internal" and were defined as those taken against full union members pursuant to a nonarbitrary rule aimed at achieving a legitimate union objective.[5] The Court held that so long as the discipline imposed by a union meets the definition of an "internal" action, it does not constitute "restraint and coercion" within the meaning of Section 8(b)(1).

In contrast to internal actions, the Court identified a category of "external" actions that are not insulated from Section 8(b)(1)'s proscriptions. These external actions are aimed at interfering with an employee's employment status[6] or are taken against nonmembers or employees outside the bargaining unit.[7] Thus, when a union rule or discipline moves outside the sphere of internal union actions, either in its scope or its target, the prohibitions of Section 8(b)(1) apply.

In *Scofield*[8] the Court refined its analysis in *Allis-Chalmbers* and sanctioned the union's enforcement of a rule setting production quotas for its members on the ground that the rule and its enforcement were internal in nature. In addition to reiterating the decisive distinction between internal and external actions,[9] the Court articulated the appropriate test for evaluating the lawfulness of a union rule and its enforcement. Thus, the Court held (394 U.S. at 430) that

> § 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has embedded in

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[5] 388 U.S. at 195.

[6] Id.

[7] Id. at fn. 25 and accompanying text.

[8] 394 U.S. 423 (1969).

[9] The Court also emphasized that the Board has long distinguished between a union's internal and external enforcement of its rules. 394 U.S. at 428, citing *Minneapolis Star & Tribune Co.*, 109 NLRB 727 (1954).

the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule.

In *Granite State*[10] the Court confronted a situation in which a union enforced its legitimate rule prohibiting employees from returning to work during a strike against employees who resigned their memberships before returning to work. In finding that the discipline imposed violated Section 8(b)(1)(A), the Court reviewed its holdings in *Allis-Chalmers* and *Scofield* and emphasized that in both of those cases the union discipline imposed was internal because it applied only to full union members.[11] The Court stated (409 U.S. at 217):

> The *Scofield* case indicates that the power of the union over the member is certainly no greater than the union-member contract. Where a member lawfully resigns from a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct. That is to say, when there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street.

The Court also reiterated the test established by *Scofield* and found that the discipline imposed in *Granite State* failed to meet that standard. Thus, although the union rule was adopted properly and reflected a legitimate union interest, it was unlawful because it impaired the principle embodied in Section 7 of the Act that confers on employees "the right to refrain from any or all" concerted activities. 409 U.S. at 216. Also, because the *Scofield* test provides that union discipline is lawful only if the members "are free to leave the union and ecape the rule," the discipline in *Granite State*

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[10] 409 U.S. 213 (1972).

[11] Id. at 215—216.

violated the Act because the employees at issue placed themselves beyond the union's legitimate sphere of authority by resigning.

Finally, the *Granite State* Court addressed a contention that the discipline was lawful because the union possessed a legitimate interest in preserving strike solidarity.[12] The Court concluded that such an interest did not justify the union's enforcement of its rule against employees who resigned. The Court stated (409 U.S. at 217—218):

> Events occurring after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind. The likely duration of the strike may increase the specter of hardship to his family; the ease with which the employer replaces the strikers may make the strike seem less provident. We do not now decide to what extent the contractual relationship between the union and member may curtail the freedom to resign. But where, as here, there are no restraints on the resignation of members, we conclude that the vitality of § 7 requires that the member be free to refrain in November from the actions he endorsed in May and that *his § 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime.* [Emphasis added and footnote omitted.]

[12] The legitimacy of a union's interest in preserving strike solidarity among its *members* was recognized in *Allis-Chalmers*, 388 U.S. at 181—182. In *Granite State* the court of appeals reasoned from the *Allis-Chalmers* premise that, by participating in a strike vote and ratifying the imposition of penalties against those who returned to work during the strike, the members who later resigned were bound to preserve strike solidarity through a "mutual subscription theory." The Supreme Court expressly rejected this theory.

In *Booster Lodge*[13] the Court applied its earlier decision in *Granite State* and found that a union violated Section 8(b)(1)(A) by fining employees who resigned before returning to work. Significantly, the Court again considered and rejected the contention that the fines against employees who had resigned were lawful because the union's constitution was interpreted consistently to bind employees to a strike despite their resignations. 412 U.S. at 89.

D. Analysis

We believe that the principles embodied in the foregoing cases compel the conclusion that the Respondent Union's efforts to restrict its members' resignations are invalid, and, indeed, that any restrictions placed by a union on its members' right to resign similarly are unlawful. We reach this conclusion for the following reasons.

Under the *Scofield* test, which the Supreme Court structured as the appropriate test to evaluate the lawfulness of a union rule and its enforcement, the union rule is valid only if it "reflects a legitimate union interest, impairs no policy Congress has embedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule." 394 U.S. at 430. As the full Board recognized in *Dalmo Victor II*, a union rule restricting resignations plainly advances legitimate union interests of maintaining strike solidarity and protecting the interests of employees who desire to continue a strike. It is equally plain, however, that such a rule substantially impairs fundamental policies embedded in the labor laws.

Most obviously, restrictions on resignations impair the fundamental policies found in the express language

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[13] 412 U.S. 84 (1973).

and consistent interpretation of Section 7. That section expressly grants employees "the right to refrain from any or all" protected concerted activities. This statutory right encompasses not only the right to refrain from strikes, but also the right to resign union membership.[14] The only statutory limitation on these Section 7 rights is contained in Section 8(b)(2) and the second proviso to Section 8(a)(3) of the Act. Even under those provisions, however, no employee can be compelled to become a full union member, and an employee thus remains free to choose to refrain from union or other concerted activities.[15] Certainly, when a union seeks to delay or otherwise impede a member's resignation, it directly impairs the employee's Section 7 right to resign or otherwise refrain from union or other concerted activities. In addition, by creating the fiction of continued membership, restrictions on resignations undermine the policies of Section 8(b)(2) and the second proviso to Section 8(a)(3) that serve to prohibit a union from compelling full union membership.

Similarly, restrictions on resignation also impair the fundamental policy repeatedly recognized by the Supreme Court to be imbedded in the very fabric of the

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[14] *Booster Lodge*, above, 412 U.S. at 87—88; *Granite State*, above 409 U.S. at 217—218; *NLRB* v. *Machinists Local 1327 (Dalmo Victor)*, 608 F.2d 1219, 1221 (9th Cir. 1979); *NLRB* v. *Machinists Lodge 1871 (General Dynamics Corp.)* 575 F.2d 54, 55 (2d Cir. 1978); *Electrical Workers Local 66 (Houston Lighting Co.)*, 262 NLRB 483 (1982); *Sales, Service, and Allied Workers' Union (Capitol-Husting Co.)*, 235 NLRB 1264 (1978).

[15] *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963): "'Membership' as a condition of employment is whittled down to its financial core." Thus, the Board has held, with court approval, that a union violates Sec. 8 (b)(1)(A) when it refuses to accept the resignations of employees on the ground that full membership is a condition of employment. *Service Employees Local 680 (Leland Stanford Junior University)*, 232 NLRB 326 (1977), enfd. 601 F.2d 980 (9th Cir. 1979).

labor laws that distinguishes between internal union actions and external union actions. A consistent and enduring basis for distinguishing between internal and external actions is whether the union's action applies only to union members. By unilaterally extending an employee's membership obligation through restrictions on resignation a union artificially expands the definition of internal action and can thus continue to regulate conduct over which it would otherwise have no control. We find no basis in the Act for allowing unions to alter unilaterally the statutory structure so carefully elucidated by the Supreme Court.[16]

We are also compelled to reject the argument that the union rule advanced here is justified because it seeks to preserve strike solidarity and protect the rights of employees who choose to continue a strike. First, on at least two occasions the Supreme Court has expressly rejected such an argument. In *Granite State*, where the members had voted to strike and *unanimously* voted for sanctions to be imposed on anyone who sought to return to work during the strike, the Court declared (409 U.S. at 217—218):

> Events occurring after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind. The likely dura-

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[16] Contrary to our dissenting colleague's assertion, we do not claim that an internal union rule that carries incidental external effects is necessarily proscribed by Sec. 8(b)(1). We fully recognize that an internal union rule such as that in *Scofield* may well have incidental external impact. The fundamental difference between a rule with incidental external effects and a rule restricting resignations, however, is that the latter rule constitutes a unilateral reordering of the basic employee-union relationship that directly and fundamentally redraws the line between internal and external actions. Admittedly, this line is not always a clear one. It is clear to us, however, that a union does not have the authority to determine unilaterally where the line should be drawn.

> tion of the strike may increase the specter of hardship to his family; the ease with which the employer replaces the strikers may make the strike seem less provident. We do not now decide to what extent the contractual relationship between the union and member may curtail the freedom to resign. But where, as here, there are no restraints on the resignation of members, we conclude that the vitality of § 7 requires that the member be free to refrain in November from the actions he endorsed in May and that *his § 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime.* (Emphasis added and footnote omitted.)[17]

Subsequently, in *Booster Lodge*, the union again argued that the union interests it sought to advance prevailed over the statutory policies, adding the contention that its constitution had been consistently interpreted to bind employees to a strike despite resignations. The Court rejected this argument, stating (412 U.S. at 89):

> [W]e are no more disposed to find an implied post-resignation commitment from the strikebreaking proscription in the Union's constitution here than we are to find it from the employees' participation

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[17] Our dissenting colleague asserts that we have taken certain principles the Court established in *Granite State* and *Booster Lodge* "out of context" because those cases did not involve a restriction on resignations. At the outset of our discussion of the relevant Court cases we acknowledged that none of the Supreme Court decisions we rely on involved a restriction on resignation and the Supreme Court noted this in the decisions themselves. It does not necessarily follow, however, that the legal principles the Court advanced are inapplicable where a restriction on resignations does exist. We cannot accept our colleague's basic argument, because the Court has not declared restrictions on resignations (which were not before it) unlawful, its decisions "clearly suggest" that some restrictions must be valid.

> in the strike vote and ratification of penalties in [*Granite State*].

We discern no legitimate basis for binding individual employees to a union's will on the strength of an explicit constitutional provision restricting resignations when the Supreme Court has been unwilling to so bind employees in the face of express employee votes and a constitution that had been consistently interpreted to effectively restrict resignations.

Second, we reiterate the position expressed in the concurring opinion in *Dalmo Victor II* that any effort to equate the *institutional interests* of a union with the *statutory rights* of employees is inappropriate. See 263 NLRB at 990—991. For, regardless of their legitimacy, the union's interests simply cannot negate or otherwise overcome fundamental Section 7 rights.

Third, any argument that suggests that the only conflict here is between unions and employees who want to resign misperceives and ignores another fundamental conflict, namely, that between those employees who choose to engage in strike activities and those who wish to refrain. In this conflict the Board should not and cannot compromise the neutrality of the Act in favor of the rights of striking employees at the expense of the rights of employees who choose not to strike by sanctioning a union's efforts to restrict resignations. For to do so is to ignore the literal prescription of Section 7 that the Act protects, with equal vigilance: the rights of employees to *engage in* and to *refrain from* union or other concerted activities.

As for the final portion of the *Scofield* test, to give effect to a union's effort to ignore resignations is contrary to the Court's holding that employees must be "free to leave the union and escape the rule." The Court expressly recognized that a union's authority does not extend to employees who do not choose to remain part of the union and subject to its rules. In our view, it is

apparent that this principle is violated by a rule that tells employees they cannot, in fact, escape the rule.

Finally, we find support for our position in the Seventh Circuit's recent decision in *Pattern Makers (Rockford-Beloit Pattern Jobbers Assn.)* v. *NLRB*, 115 LRRM 2264 (7th Cir. Dec. 21, 1983), enfg. 265 NLRB 1332 (1983). In that case the Board, citing *Dalmo Victor II*, held that the union's rule restricting resignations during a strike or when a strike is imminent was unreasonable. The court enforced the Board's Order. In so doing, the court declined to pass on the issue that divided the Board in *Dalmo Victor II*, i.e., whether a 30-day restriction would be valid. The court's analysis, however, was strikingly similar to that advanced by the concurring opinion in *Dalmo Victor II*.[18] The court emphasized the fundamental distinction between "internal" and "external" actions and stated that "a union rule requiring retention of membership cannot be considered merely an 'internal matter.'" *Pattern Makers*, 115 LRRM at 2267. The court stated that the union's restriction on resignations frustrated the fundamental policy of the Act allowing employees to choose to engage in or refrain from concerted activities. The court also observed that this fundamental policy cannot be overridden by a union's plea for solidarity. Id. at 2266. Finally, referring to the *Scofield* principle that union

[18] As in its analysis of the relevant Supreme Court precedent (see fn. 17, above) the dissent seeks to avoid the implications of this decision by arguing what the Court did not say rather than what it did say. Thus, the dissent dismisses this decision by arguing, correctly, that the Court declined to pass on the validity of a 30-day restriction on resignations. The Court did not address that issue, however, for the simple reason that no such rule was before it. Unlike our collegue, we find support for our decision in the Court's legal analysis which, for the most part, tracks the reasoning advanced in the concurring opinion in *Dalmo Victor II*, which we in turn advance.

members must be free to leave the union and escape the rule, the court concluded (id. at 2267):

> This fundamental principle is the embodiment of individuals' Section 7 rights and safeguards the balance between individual rights and the collective power of the union. The principle applies to the circumstances presented in this case.

In contrast to the Seventh Circuit's decision, the Ninth Circuit recently denied enforcement of the Board's Order in *Dalmo Victor II*[19] and held that a union lawfully can restrict its members' right to resign. Because the instant case arises in the Ninth Circuit and because that court's opinion did not address in detail the concurring opinion in *Dalmo Victor II*, which now represents the Board majority, we find it necessary to explain our respectful disagreement with the Ninth Circuit.

Much of the Ninth Circuit's opinion advances a "mutual subscription" theory whereby employees who resign their memberships and then refrain from strike activity are said to "escape their obligation to their colleagues" and to be "breaching a promise." In the court's view, the resigning employees "may not betray their colleagues and expect to get away without paying a price . . . ." 115 LRRM at 2976. We respectfully submit that the court's analysis is in error, because in *Granite State* the Supreme Court expressly rejected a similar "mutual subscription" theory advanced by the First Circuit. See *NLRB* v. *Granite State Joint Board, Textile Workers Local 1029*, 446 F.2d 369, 372—373 (1st Cir. 1971), reversed 409 U.S. 213, 217—218 (1972); *Dalmo Victor II*, 263 NLRB at 989—990 (concurring opinion).

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[19] *Machinists Local 1327 (Dalmo Victor)* v. *NLRB*, 115 LRRM 2972 (9th Cir. Feb. 14, 1984).

The Ninth Circuit also invoked the principle that unions are responsible for representing the entire unit of employees and, therefore, the wishes of individual employees are subservient to the majority will that the union embodies. In the court's words, "[F]ederal labor policy restricts the individual employee's absolute power to order his relations with management." 115 LRRM at 2975. We agree. We are required to add, however, that *Federal labor policy manifestly does not restrict employees' absolute authority to order their relationship to the union*, at least insofar as membership and nonmembership are concerned. See fn. 16, above, and accompanying text. Thus, while by the terms of the Act a union's views on terms and conditions of employment generally prevail over individual employees' desires on such matters, Section 7 explicitly guarantees to all employees the right to "refrain from any or all" union or other concerted activities, including the right to resign. In short, a union can act to order an employee's relations with management, but it cannot, without restriction, unilaterally order an employee's membership relations with the union.

We are also unable to adopt the Ninth Circuit's view that the proviso to Section 8(b)(1)(A) grants unions the authority to impose indefinite temporal restrictions on the right of employees to resign their memberships and then refrain from strike activity. Such an interpretation of the proviso is contrary to the quartet of Supreme Court cases (see fn. 3, above) that construe the labor laws as distinguishing between permissible internal and prohibited external union actions. Thus, while a union can enact and enforce rules that are internal in scope and target, it possesses no statutory authority to impose its will on employees who exercise their Section 7 right to resign and thereby refrain from concerted activity. For at that juncture, any action the union takes against the resigned employee is, by definition, "exter-

nal," unless the proviso is read as authority for a union unilaterally to shift the line of demarcation between internal and external actions. We are unable to interpret the proviso in such a fashion.[20]

We also disagree with the Ninth Circuit's view that the union interests embodied in its reading of the proviso and an employee's right to resign and refrain from concerted activities "must—and do—coexist." 115 LRRM at 2976. As stated before, we adopt the view of the concurring opinion in *Dalmo Victor II* that while a union's interests in preserving strike solidarity and protecting the interest of striking members are legitimate, such *institutional interests*, no matter how legitimate, are insufficient to negate *express statutory rights*. 263 NLRB at 990—991. Indeed, under the court's definition of "coexistence," an employee's Section 7 rights are totally abrogated for an indefinite time period and are effectively read out of the Act. Further, it is no answer to say that an employee is free to resign so long as he or she is "willing to pay the price," because a "right" to act, but at the risk of a debilitating fine, is no right at all.

Finally, in applying the *Scofield* test, the Ninth Circuit overlooked the final portion of the test that provides that the union rule must be "reasonably enforced against union members who are free to leave the union and escape the rule." 394 U.S. at 430. We agree with the Seventh Circuit that "[t]his fundamental principle is the embodiment of individuals' Section 7 rights and

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[20] It bears emphasis that the Supreme Court's analysis included consideration of the 8(b)(1)(A) proviso. See, e.g., *Scofield*, above, 394 U.S. at 428. Accordingly, the proviso must be interpreted and applied in a manner that is consistent with the maintenance of a distinct separation between permissible internal regulation and prohibited external action. The Ninth Circuit's view of the proviso fails to respect that essential distinction.

safeguards the balance between individual rights and the collective power of the union." *Pattern Makers*, above, 115 LRRM at 2267.

E. Conclusion

In conclusion, we believe that a thorough review of the Act and its legislative history, particularly Section 7, and a careful reading of relevant Supreme Court, courts of appeals, and Board decisions compel the conclusion that a union may not lawfully restrict the right of its members to resign from membership. Accordingly, we find that the Respondent violated Section 8(b)(1)(A) by imposing a fine on Locki for returning to work during the strike after he resigned his membership in the Respondent Union.

CONCLUSIONS OF LAW

1. Neufeld Porsche-Audi, Inc., Burlingame, California, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By imposing a fine against Branislav Locki for returning to work at Neufeld Porsche-Audi, Inc. during the strike that commenced on 8 September 1981, after Locki resigned his membership in the Respondent Union, the Respondent violated Section 8(b)(1)(A) of the Act.

4. The foregoing unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent engaged in an unfair labor practice in violation of Section 8(b)(1)(A) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act, including the refund

to Locki of any moneys he may have paid as a result of the fine imposed against him, with interest computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[21] In addition, we shall order the Respondent to cease and desist from maintaining the restriction on resignations found invalid and to expunge the provision from its governing documents. *Engineers and Scientists Guild (Lockheed-California Co.)*, 268 NLRB No. 42 (Nov. 25, 1983).[22] In so doing we note that we are not ordering that the parent International, which is not a party to this proceeding, expunge the offending provision from its constitution. Rather, we are only ordering the Respondent to expunge the provision from its governing documents including such documents of the International that the Respondent may have incorporated by reference and adopted as its own. Further, here as in *Lockheed*, the lack of a separate allegation that the maintenance of the restriction is violative has no bearing on our exercise of our discretion to fashion appropriate remedies for the violations found, since here the link between the restriction and the violation is evident.

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[21] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[22] Member Dennis would not order the Respondent to "cease and desist from maintaining the restriction on resignations" because the complaint does not allege the maintenance of the constitutional provision to be unlawful. Furthermore, Member Dennis considers it impracticable to order the Respondent, a local union, to "expunge" a provision appearing in the constitution of the parent International, which is not a party to this proceeding. Instead, Member Dennis would find that, in order to remedy fully the violation found, the Respondent should be ordered to notify its members, in writing, tht it will not enforce the restriction on resignations set forth in art. L, sec. 3 of the International consititution.

ORDER

The National Labor Relations Board orders that the Respondent, International Association of Machinists and Aerospace Workers, Local Lodge 1414, AFL-CIO, San Mateo, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining in its governing documents article L, section 3 of the constitution of the International Association of Machinists and Aerospace Workers to the extent it provides:

> Improper Conduct of a Member: . . .
>
> Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout if the resignation occurs during the period of the strike or lockout or within 14 days preceding its commencement. Where observance of a primary picket line is required, any resignation tendered during the period that the picket line is maintained, or within 14 days preceding its establishment, shall not become effective as a resignation during the period the picket line is maintained, nor shall it relieve a member of his or her obligation to observe the primary picket line for its duration.

(b) Restraining or coercing employees who have resigned from, and are no longer members of, the Respondent in the exercise of the rights guaranteed them by Section 7 of the Act by imposing court-collectible fines on such employees because of their postresignation conduct in working at Neufeld Porsche-Audi, Inc. during the strike that began on 8 September 1981.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Expunge from its governing documents the portion of article L, section 3 of the constitution of the International Association of Machinists and Aerospace Workers set forth above.

(b) Rescind the fine levied against Branislav Locki because of his postresignation work for Neufeld Porsche-Audi, Inc. during the strike that began on 8 September 1981 and refund to him any moneys he may have paid as a result of such fine, with interest.

(c) Post at its business office and meeting halls copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Sign and return to the Regional Director sufficient copies of the notice for posting by Neufeld Porsche-Audi, Inc., if willing, at all places where notices to employees are customarily posted.

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[23] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. 22 June 1984

/S/ _____
DONALD L. DOTSON,
Chairman

/s/ _____
ROBERT P. HUNTER,
Member

/s/ PATRICIA DIAZ DENNIS,
Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

DON A. ZIMMERMAN, dissenting in part.

My colleagues today conclude that the Section 7 right of an employee to refrain from union activity is so inviolate that it does not countenance *any* restrictions on resignation from a union, no matter how temporally limited the restriction may be. That the restriction, by definition, would apply only after the exercise of another Section 7 right—to join a union—to no extent alters the decision. That the employee is fully cognizant of the restriction when he or she joined the union similarly is of no moment. That individual Section 7 rights are, in numerous other areas, reshaped or impinged upon by a prior exercise of a Section 7 right also does not suggest a different result. Finally that the statute itself entitles a labor organization to "prescribe its own rules with respect to the acquisition or retention of membership" is of no consequence to them.

Such indifference strikes me as significantly impairing the power that accompanies, and Congress thought should accompany, the right to strike. But, after all, it is in the context of a union's exercise of its ultimate economic weapon that the apparent conflict between an employee's right to refrain from union activity and the union's right to establish membership rules comes sharply into focus. The Act is a legislative enactment with compromise and conflict at its core, leaving tension which the Board must seek to accommodate. The better view, the one more befitting our actual responsibilities, is that which emerges from *Machinists Local 1327 (Dalmo Victor)*, 263 NLRB 984 (1982) *(Dalmo Victor II)*. That decision sought to balance the competing interests of the individual and the group and, in the balance, concluded that a limited degree of intrusion upon the Section 7 right to refrain was permissible where an employee *had* joined a union and was aware, when joining, of the restriction itself.

The purported underpinning for my colleagues' conclusion that there is, in effect, no such thing as a reasonable restriction on resignation is the same series of Supreme Court decisions on which the Board in *Dalmo Victor II* relied. A review of those decisions, however, shows that the Board in *Dalmo Victor II* took the correct view of the Supreme Court's pronouncements in those cases.

Allis-Chalmers,[1] which the majority uses as its starting point, actually lays to rest the notion that the right to refrain from union activity is absolute. There the Supreme Court held, in agreement with the Board, that a union does not violate the Act when it fines members who cross a picket line and return to work during a strike. In so doing, the Supreme Court rejected the basic premise of the Seventh Circuit that "union members who cross their own picket lines would be regarded as exercising their Section 7 rights to refrain from engaging in a particular concerted activity ...." Citing *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192, the Court stated that "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents ...." Implicit in *Allis-Chalmers* is the clear understanding that the Section 7 right to refrain from engaging in concerted activity, through resignation from a union, is not absolute but rather may be subject to some limitation.

The majority also sees *Scofield*[2] as supportive of its position. The *Scofield* decision, like the other decisions relied on by my colleagues, did not involve the question presented here. Rather, in *Scofield* the Supreme Court was asked to determine whether a union rule re-

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[1] *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967).

[2] 394 U.S. 423 (1969).

stricting production quotas for its members violated Section 8(b)(1)(A) of the Act. Finding that the restriction imposed by the union's rule was lawful, the court rejected, as it did in *Allis-Chalmers*, a claim by the petitioners that the rule infringed on their Section 7 right to refrain from concerted activities. Thus, *Scofield*, like *Allis-Chalmers*, supports the view that the Section 7 right to refrain is not absolute.

It is true that the Court in *Scofield* stated that for a union rule to be valid and enforceable, it must be "reasonably enforced against union members who are free to leave the union and escape the rule." Indeed, it was in recognition of the Court's statement that the Board in *Dalmo Victor II* found the union's rule, prohibiting its members from resigning during the entire period of a strike, to be an unreasonable restriction. However, there is nothing in the *Scofield* or *Allis-Chalmers* decisions to suggest that a limited and reasonable restriction on resignation would not be sanctioned by the Court. Rather, it would appear from the Court's holding in those decisions that a reasonable restriction, such as that stated in *Dalmo Victor II*, is permissible under the Act.

The majority's attempt to support their decision by reference to the Court's language in *Granite State*, 409 U.S. 213 (1972), is also to no avail. The Court in *Granite State* was asked to decide whether a union could lawfully impose discipline on an employee member who tenders his resignation and returns to work during a strike, where the union's constitution or bylaws contain no provision restricting such resignations. The Court, again in agreement with the Board, held that it could not. In finding as it did, however, the Court was careful to point out that its holding was limited to situations where no restriction on resignations exist. Thus, it stated that "[w]e have here no problem of construing a union's constitution or bylaws defining or limiting the

circumstances under which a member may resign from the union." Id. at 216. It further stated that it was not then deciding "to what extent the contractual relationship between union and member may curtail the freedom to resign." Id. at 217.

Despite these statements by the Court in *Granite State*, the majority claims that the right to resign is absolute and is supported by the following language in the case (409 U.S. at 217—218):

> Events occurring after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind. The likely duration of the strike may increase the specter of hardship to his family; the ease with which the employer replaces the strikers may make the strike seem less provident. We do not now decide to what extent the contractual relationship between the union and member may curtail the freedom to resign. *But where, as here, there are no restraints on the resignation of members*, we conclude that the vitality of § 7 requires that the member be free to refrain in November from the actions he endorsed in May and that his § 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime. [Emphasis added and footnote omitted.]

Although the Court did say that the "vitality of Section 7 requires that the member be free to refrain in November from the actions he endorsed in May," its remarks were, as noted, prefaced with the words: "*But where, as here, there are no restraints on the resignation of members, we conclude that . . .*" [emphasis added]. The majority has ascribed to the *Granite State* language a meaning the Court neither intended nor implied. To the contrary, the Court's remarks in their entirety strongly suggest a meaning opposite the one given to them by my colleagues. If, as they find, there can be no reasonable restriction on resignations, then

the emphasized portion of the quote becomes superfluous.

My colleagues further note that the Court in *Granite State* admonished that "Section 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime." 409 U.S. at 218. However, they ignore the fact that, in so stating, the Court was addressing itself to situations where no restriction on resignation existed. *Dalmo Victor II* is not inconsistent with *Granite State*, when viewed in this light. As found in *Dalmo Victor II*, the absence of a reasonable restriction on resignation did not deprive the employees of the opportunity to resign upon submitting their resignations.

The majority also misreads *Boeing*.[3] There, the Court held that the union could not restrict a member's right to resign on the basis of a constitution which the majority characterizes as "consistently ... interpreted to effectively restrict resignations." But, as is evident in *Boeing*, the Court's finding that employees could resign at will from the union was premised solely on the union's admission that there was no express restriction on resignation at all. Furthermore, the union's constitution in *Boeing* sought only to control a member's postresignation conduct, by forbidding former members from returning to work during a strike. The Court, relying on *Granite State*, held that in the absence of a restriction on resignation itself, a member was free to resign at will and, once having done so, the union could have no more control over him than it would have over "the man in the street." A union's attempt to impose its will on members who are free to resign at any time is far different from the situation where there is a restriction on resignation. In such a case, the issue is whether

[3] *Machinists Booster Lodge 405 (Boeing Co.)* v. *NLRB*, 412 U.S. 84 (1973).

such a restriction is reasonable and, if so, whether it could lawfully be applied. My colleagues beg the question when they note only that in both instances "resignations" have been submitted.

The majority also looks to the Seventh Circuit's decision in *Pattern Makers (Rockford-Beloit Pattern Jobbers Assn.)* v. *NLRB*, 115 LRRM 2264 (7th Cir. Dec. 21, 1983), to support their view that no restriction on resignations is possible under our Act. In *Pattern Makers* the court, unlike my colleagues, acknowledged the existence of a conflict between the two fundamental principles of labor law *Dalmo Victor II* sought to balance. Thus, the court noted that the sole issue before it was to "resolve the tension between policies when the Union seeks absolutely to prohibit resignations during a strike or when one appears imminent." It is therefore evident that its finding that a "union cannot compel membership during a strike" was addressed exclusively to whether a union can lawfully restrict a member's right to resign *for the duration of a strike*. Significantly, the Seventh Circuit specifically declined to rule on the question of whether a 30-day restriction on the right to resign, as adopted by the Board in *Dalmo Victor II*, was reasonable as that issue was not before it. Clearly, such a declination would not be necessary or appropriate if my colleagues' interpretation of the circuit court's decision was correct.[4]

[4] As noted by my colleagues, the Ninth Circuit recently denied enforcement of the Board's decision in *Dalmo Victor II*. See *Machinists Local 1327* v. *NLRB*, 115 LRRM 2972 (Feb. 14, 1984). In *Machinists* the court rejected the view taken by a plurality of the Board in *Dalmo Victor II* that resolution of this issue required a balancing of competing interests. The court nevertheless concluded, contrary to both the plurality and concurring views in *Dalmo Victor II*, that a union rule restricting resignations during the course of a strike could be, and in that case was, reasonable and enforceable. Thus, while the court rejected the 30-day rule adopted by the Board in *Dalmo*

Finally, my colleagues contend that for a union rule to be valid and enforceable, it must be purely internal in nature and that if a union rule or discipline moves outside the sphere of internal union actions, either in its scope or its target, the prohibitions of Section 8(b)(1)(A) apply. They point out that this "decisive distinction between internal and external actions" was acknowledged by the Supreme Court in *Allis-Chalmers* and *Scofield*. In their view, "by unilaterally extending an employee's membership obligation through restrictions on resignation a union artificially expands the definition of internal action and can thus continue to regulate conduct over which it would otherwise have no control."

Neither I nor the Supreme Court consider the distinction between "internal" and "external" actions to be as clear as my colleagues profess it to be. In *Boeing*, at 74, the Court stated that "the line may not always be clear between those matters that are internal and those that are external ...." Similarly a union rule which is designed to be internal in nature but which incidentally affects external matters is not necessarily proscribed by Section 8(b)(1) of the Act. This was acknowledged by the Supreme Court in *Scofield*, at 432, when it

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Victor II, it obviously rejected the notion proposed by my colleagues today that an employee's right to resign is absolute and that no restriction on that right is possible. Like my colleagues, I also respectfully disagree with the Ninth Circuit's opinion in *Dalmo Victor II*. Rather, like the Seventh Circuit in *Rockford-Beloit*, I adhere to the view that a proper resolution of this issue necessitates a balancing of competing interests. Under this approach, and when viewed in light of the relevant Supreme Court decisions on this issue, I conclude that neither the employee's right to resign nor the union's right to restrict resignations during a strike is absolute. Accordingly it was proper for the Board in *Dalmo Victor II* to hold that a 30-day restriction on resignations could, other considerations being satisfied, be regarded as reasonable.

stated that "[a]lthough the enforcement of the rule [on production quotas] is handled as an internal union matter, the rule has and was intended to have an impact beyond the confines of the union organization .... [I]t does not follow from this that the enforcement of the rule violates Section 8(b)(1)(A), unless some impairment of a statutory labor policy can be shown." Notwithstanding that the internal rule was designed to reach beyond the confines of the union to external matters, the Court concluded that the rule did not impair the members' Section 7 right to refrain from concerted activities.

The Board's decision in *Dalmo Victor II* acknowledged the substantial interests served by a union's capacity both to predict and act upon assessments of its economic strength, and sought to accommodate those interests with other competing statutory rights. Hollow references to the inherent primacy of "statutory rights" over "union interests" do not obviate the legitimacy of those interests. Their importance to national labor policy is indeed part of the fabric and fiber of the Act itself. In any event, *Dalmo Victor II* placed the "statutory right" well above the "union interest" in its requirements of notice, specificity, and temporal limitation. In other words, it permitted an intrusion, but only a limited one, on the Section 7 privilege to refrain.

It is an undeniable proposition that individual Section 7 rights have never, until now, been interpreted as absolute. Whatever the Section 7 right of the employees in *Emporium Capwell*[5] to engage in protected activity, the Supreme Court subordinated it because, at the time they sought to exercise it, they already were represented by an exclusive representative. So too unions may and do waive an employee's preeminent statutory

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[5] *Emporium Capwell Co.* v. *Western Addition Community*, 420 U.S. 50 (1975).

right, the right to strike. Other examples are there, but they would all only further serve to demonstrate the qualification of one Section 7 right that sometimes exists because of the prior exercise of another Section 7 right.

This majority has failed to accommodate the competing interests at work in cases of this calibre and to reconcile them within the overall scheme of the Act, as the Board sought to do in *Dalmo Victor II*. Accordingly, I dissent from its overruling.[6]

Dated, Washington, D.C. 22 June 1984

/S/ _____

DON A. ZIMMERMAN,
Member
NATIONAL LABOR RELATIONS BOARD

[6] However, for the reasons stated in *Dalmo Victor II*, I agree with my colleagues that the Respondent's rule against resignations is unreasonable and that the fines imposed pursuant to that rule on employee-members who tendered resignations during the strike and returned to work violated Sec. 8(b)(1)(A) of the Act. I therefore concur in the result.

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain in our governing documents article L, section 3 of the constitution of the International Association of Machinists and Aerospace Workers to the extent it provides:

> Improper Conduct of a Member: . . .
>
> Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout if the resignation occurs during the period of the strike or lockout or within 14 days preceding its commencement. Where observance of a primary picket line is required, any resignation tendered during the period that the picket line is maintained, or within 14 days preceding its establishment, shall not become effective as a resignation during the period the picket line is maintained, nor shall it relieve a member of his or her obligation to observe the primary picket line for its duration.

WE WILL NOT restrain or coerce employees who have resigned from, and are no longer members of, the Union in the exercise of the rights guaranteed them by Section 7 of the Act by imposing court-collectible fines on such employees because of their postresignation conduct in working at Neufeld Porsche-Audi, Inc. during the strike that began on 8 September 1981.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL expunge from our governing documents the portion of article L, section 3 of the constitution of the International Association of Machinists and Aerospace Workers set forth above.

WE WILL rescind the fine levied against Branislav Locki because of his postresignation work for Neufeld-Porsche Audi, Inc. during the strike that began on 8 September 1981 and WE WILL refund to him any moneys he may have paid as a result of such fine, with interest.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL LODGE 1414, AFL-CIO

(Labor Organization)

Dated _____ By: _____
(Signature) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 13018, P.O. Box 36047, 450 Golden Gate Avenue, San Francisco, California 94102, Telephone 415-556-0335.

No. 84-494

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FILED
OCT 10 1984
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MACHINISTS LOCAL 1327, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO DISTRICT LODGE 115, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For
The Ninth Circuit

MEMORANDUM FOR RESPONDENT INDIVIDUAL EMPLOYEES AND MOTION TO EXPEDITE CONSIDERATION OF PETITIONS FOR CERTIORARI AND TO CONSOLIDATE WITH NO. 83-1894 AND NO. 84-528

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October 10, 1984

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1. Respondents Viola Lapinski, Hilda Hall, Polmyra L. Gomes, and Robert C. Ferguson are the individual employees who were the charging parties before the National Labor Relations Board ("the Board") and intervened in the case in the court of appeals. It is their statutory right to refrain from union activity which has been abridged erroneously by the decision of the court of appeals; and they have filed their own separate petition for a writ of certiorari. *Lapinski v. Machinists Local 1327*, No. 84-528 (U.S. filed Oct. 1, 1984). Accordingly,

the employees urge that the Board's petition, as well as their own, be granted.

2. As the Board points out, the decision of the court of appeals that a union constitution lawfully may restrict resignations immediately preceding and during a strike is "in direct conflict with the decision of the Seventh Circuit in *Pattern Makers League v. NLRB*, 724 F.2d 57 (7th Cir. 1983)." Petition for a Writ of Certiorari at 7, *NLRB v. Machinists Local 1327*, No. 84-494 (U.S. filed Sept. 27, 1984). The Court granted certiorari in *Pattern Makers* on October 1, 1984. 53 U.S.L.W. 3235 (U.S. No. 83-1894).

The Court could, of course, defer consideration of the petition in this case pending the disposition of *Pattern Makers*. However, there are two reasons for granting certiorari in this case at this time.

First, although we believe that *Pattern Makers* and this case present the same legal question,[1] the union constitutional provisions restricting the right to resign are not identical. The rule of the Pattern Makers' League entirely prohibits any resignation immediately preceding and during a strike. *Pattern Makers*, 724 F.2d at 58. The Machinists union's provision prohibits a resignation during the same period only for the purpose of returning to work for a struck employer. Petition for a Writ of Certiorari, Appendix A at 3a, *NLRB v. Machinists*

[1] The Board and the Pattern Makers' League agree. *See* Petition for a Writ of Certiorari at 8 n.7, *NLRB v. Machinists Local 1327*; Petition for a Writ of Certiorari at 8, *Pattern Makers v. NLRB*. The Machinists and Pattern Makers had the same lead counsel in the courts of appeals. *Machinists Local 1327 v. NLRB*, 725 F.2d 1212, 1214 (9th Cir. 1984); *Pattern Makers*, 724 F.2d at 58.

Local 1327. The Ninth Circuit attached some significance to this distinction. *See id.* at 10a. This Court should have both provisions before it at the same time so that with a single decision it can establish that neither restriction upon employees' freedom of association is permitted by the National Labor Relations Act, 29 U.S.C. §§ 157, 158(b)(1)(A) (1982).

Second, the persons whose interests are directly affected by a union restriction upon resignation, the individual employees fined for returning to work during a strike, are not parties in *Pattern Makers*, whereas they are in this case.[2] Although both the Board and the employees contend that unions cannot lawfully restrict resignations, they have separate interests, since the Board's role is primarily that of an administrative agency charged with representing the public interest. *See Automobile Workers, Local 283 v. Scofield*, 382 U.S. 205 (1965). Participation of the employees whose individual rights are at stake will provide the Court with a complete perspective on the question of statutory interpretation presented in these cases.

3. The briefs in *Pattern Makers* are due to be filed in November and December 1984, and the case presumably will be set for argument later in this Term. Because the parties and the union constitutional provisions in *Pattern Makers* are not identical to those in the *Machinists Local 1327* cases, we do not believe that all three cases should be consolidated for briefing. However, it would

[2] The charging party-intervenor in *Pattern Makers* is an employer association. 724 F.2d at 58; Petition for a Writ of Certiorari, Appendix at 25a, *Pattern Makers*.

be appropriate for the Court to consolidate these cases with *Pattern Makers* for oral argument in order to facilitate the Court's consideration of the common legal issue.

Therefore, for the foregoing reasons, the respondent employees respectfully move that the Court expedite its consideration of the petitions herein and in No. 84-528 and grant certiorari and consolidate them for all purposes, such that they may be briefed in time to be argued together with *Pattern Makers*. The employees further move that, in the event certiorari is granted herein and in No. 84-528, the cases be consolidated for oral argument with No. 83-1894.

Respectfully submitted,

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MACHINISTS LOCAL 1327, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *et al.*,
Respondents.

On Petitions for a Writ of Ceritorari to the United States Court of Appeals for the Ninth Circuit

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MEMORANDUM FOR THE RESPONDENT UNIONS

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---

MEMORANDUM FOR THE RESPONDENT UNIONS

The first reason for granting the National Labor Relations Board's petition for a writ of certiorari in No. 84-494 stated therein is that:

> The decision of the court of appeals that a union does not commit an unfair labor practice by enforcing a [union] constitutional provision restricting resignations during a strike or within 14 days preceding its commencement is * * * in direct conflict with the decision of the Seventh Circuit in *Pattern Makers League v. NLRB*, 724 F.2d 57 (7th Cir. 1983) * * *.
>
> The conflict between the Seventh and Ninth Circuits concerns an important and recurring question under the Act, which this Court has expressly left open on two occasions. [See] *NLRB v. Granit State Joint Board, Textile Workers Union*, [409 U.S. 213 (1972)] and *Booster Lodge No. 405, International Association of Machinists v. NLRB*, 412 U.S. 84 (1973) * * *. Now that the Board has decided that important question and the Board's decision has precipitated a direct conflict in the circuits, it is appropriate for the Court to settle the issue. [NLRB Pet. 7-10. See, to the same effect, the petition for a writ of certiorari in *Lapinski, et al. v. Machinists*, No. 84-528, pp. 7-8, 13-14.]

The respondent unions agree with the foregoing but suggest that in light of the following considerations the certiorari petitions in Nos. 84-494 and 84-528 should be held on the Court's docket.

1. On October 1, 1984 the Court granted the petition for a writ of certiorari in *Pattern Makers League of North America, AFL-CIO, et al. v. NLRB, et al.*, No. 83-1894, and thereby agreed to review the Seventh Circuit's decision in conflict with the Ninth Circuit's decision herein. *Pattern Makers* is presently scheduled to be argued in the January, 1985 session; granting the petitions here and consolidating the cases would in all likelihood require rescheduling and delaying the submission of the *Pattern Makers* case.

2. It does not appear that there is any significant difference between *Pattern Makers* and the instant cases of the kind that would assist the Court in better under-

standing the common question presented in that case and in these or that question's ramifications. While the union rule at issue in *Pattern Makers* and the rule at issue here are different in form, the NLRB has, in the underlying proceedings leading to these certiorari petitions, treated the two as legally indistinguishable and states in its petition "We do not believe that the difference between the provision in *Pattern Makers* and the one in the instant case is legally significant." NLRB Pet. 8 n. 7. It is our position that in this one respect the Board's reasoning cannot be faulted.[1]

CONCLUSION

For the above-stated reasons, the petitions for a writ of certiorari in these cases should be held for further action pending the disposition of *Pattern Makers League of North America, AFL-CIO, et al. v. NLRB, et al.*, No. 83-1894, petition for a writ of certiorari granted October 1, 1984.

Respectfully submitted,

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[1] Ms. Lapinski, et al. (the four individuals who sought to resign their union membership and by so doing precipitated these cases and, who are respondents in No. 84-494 and petitioners in No. 84-528) are not, of course, parties in the *Pattern Makers* case. See Memorandum for Respondent Individual Employees and Motion to Expedite Consideration of Petitions for Certiorari to Consolidate with No. 83-1894 and No. 84-528, p. 3. But they can protect their interests in the way parties to cases behind a lead case normally do—by filing a brief *amicus curiae*.